INDIAN LAW REPORTS,

CALCUTTA SERIES,

CONTAINING

CASES DETERMINED BY THE HIGH COURT AT CALCUTTA AND BY THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL ON APPEAL FROM THAT COURT AND FROM ALL OTHER COURTS IN BRITISH INDIA [EXCEPT THE COURT OF THE JUDICIAL COMMISSIONER OF OUDH] NOT SUBJECT TO ANY HIGH COURT.

Editor ... B. D. BOSE, *Barrister-at-Law* (*offg.*).

REPORTERS :

PRIVY COUNCIL ... ... J. V. WOODMAN, *Barrister-at-Law.*

HIGH COURT, CALCUTTA ... S. C. GHOSE, *Vakil, High Court.*
J. CAMELL, *Barrister-at-Law.*
E. H. MONNIER, *Barrister-at-Law.*
S. MITRA, *Vakil, High Court.*
C. E. BAGRAM, *Barrister-at-Law.*
S. KHUDA BUKHSH, *Barrister-at-Law*
O. MOSES, *Barrister-at-Law* (*offg.*)

VOL. XXXIX.

JANUARY TO DECEMBER 1912.

Published under the Authority of the Governor-General in Council

BY THE BENGAL SECRETARIAT FINANCIAL DEPARTMENT,
BOOK DEPOT BRANCH,
WRITERS' BUILDINGS, CALCUTTA.

THE HIGH COURT,

1912.

—:o:—

Chief Justice :

THE HON'BLE SIR LAWRENCE HUGH JENKINS, KT., K.C.I.E.

Puisne Judges :

THE HON'BLE JUSTICE SIR RICHARD HARINGTON, BART.
" " SIR CECIL M. W. BRETT, KT., C.S.I.
" MR. JUSTICE H. L. STEPHEN.
" " " J. G. WOODROFFE.
" JUSTICE SIR ASUTOSH MOOKERJEE. KT., C.S.I.
" MR. JUSTICE C. P. CASPERSZ (*resigned 17th November 1912*).
" " " H. HOLMWOOD.
" " " C. W. CHITTY.
" " " E. E. FLETCHER.
" " " S. SHARFUDDIN.
" " " H. R. H. COXE.
" " " H. W. C. CARNDUFF, C.I.E.
" " " D. CHATTERJEE.
" " " N. R. CHATTERJEA.
" " " W. TEUNON (*Additional Judge*).
" " " A. CHAUDHURI (*Additional Judge*).
" " " S. HASSAN IMAM (*Additional Judge*).
" " " T. W. RICHARDSON (*Additional Judge*).
" " " C. P. BEACHCROFT (*offg.*).
" " " E. P. CHAPMAN (*offg.*).

THE HON'BLE MR. G. H. B. KENRICK, K.C., *Advocate-General.*
" " B. C. MITTER, *Standing Counsel.*

CORRIGENDA.

Page 4, line 14, *for* "made" *read* "name."

Page 36, last line but one (ref.), *for* "Ch. 6 App." *read* "6 Ch. App."

Page 43, line 4 from bottom (ref.), *for* "W. N. 111" *read* "All. W. N. 111."

Page 47, line 5 from bottom (ref.), *for* "W. N. 53" *read* "All. W. N. 53."

Page 139, lines 17, 18, *for* "could not, in the view he took of the case, be said to be a 'protected interest'" *read* "was an incumbrance, not on the superior *darganti* tenure which was sold for arrears of rent, but on the *darmaurusi kayemi ganti* subordinate to it. The question whether the right claimed by the plaintiffs was a 'protected interest' or not was not argued before him though it had been noticed in the judgment of the Munsif."

Page 292, line 4 from bottom (ref.), *for* "I. L. R. 20 W. R." *read* "20 W. R."

Page 401, line 24, *for* "*Dowden* v. *Dowden*," *read* "*Durant* v. *Durant* (1)."

Page 682, line 20 (italics), *for* "ss. 494 and 574" *read* "495 and 574."

Page 682, line 25 (small type), *for* "such as" *read* "such."

TABLE OF CASES REPORTED.

VOL. XXXIX.

——:o:——

PRIVY COUNCIL.

	PAGE.		PAGE.
Bir Bikram Deo *v.* Secretary of State for India	615	Mahomed Ibrahim Hossain Khan *v.* Ambika Pershad Singh	527
Clarke *v.* Brajendra Kishore Roy Chowdhury	953	Mi Me *v.* Mi Shwe Ma	492
Durga Prasad Singh *v.* Braja Nath Bose	696	Mir Sarwarjan *v.* Fakhruddin Mahomed Chowdhuri...	232
Haji Buksh Elahi *v.* Durlav Chandra Kar	981	Muhammad Umar Khan *v.* Muhammad Niaz-ud-din Khan	418
Ibrahim Ali Khan *v.* Muhammad Ahsanulla Khan	711	Rameshwar Singh *v.* Secretary of State for India	1
Jadu Lal Sahu *v.* Janki Koer ...	915	Rang Lal Singh *v.* Rameshwar Pershad Singh	26

FULL BENCH.

Emperor *v.* Abbas	150	Mehi Singh *v.* Mangal Khandu ...	157
Kartick Chandra Ghose *v.* Ashutosh Dhara	298	Raj Kumari Debi *v.* Barkatulla Mandal ...	278
Lalit Mohan Ghosh *v.* Gopali Chuck Coal Company, Ld.	284		

ORIGINAL CIVIL.

Bombay Co., Ld., The *v.* The National Jute Mills Co.	669	Lodna Colliery Co., Ld., *v.* Bipin Bihari Bose	739
Charnock Collieries Co., Ld., *v.* Bholanath Dhar	810	R. C. Sen, *In re*	598
Kamini Dasee *v.* Krishna Chandra Mukerjee	933	Ramgopal Jhoonjhoonwala *v.* Joharmall Khemka	473

APPEALS FROM ORIGINAL CIVIL.

Angullia & Co. *v.* Sassoon & Co. ...	568	Paul *v.* Robson	59
Galstaun *v.* Hutchison	789	Ramji Das *v.* Janki Das	802
Jarat Kumari Dassi *v.* Bissessur Dutt ...	245	Ranjit Lal Karmakar *v.* Bijoy Krishna Karmakar	582
Khitish Chandra Acharjya Chowdhury *v.* Osmond Beeby	587	Shib Kristo Daw & Co. *v.* Satish Chandra Dutt	822
Nisith C. Sen, *In re*	754		

APPELLATE CIVIL.

	PAGE.
Abhoy Charan Jalia *v.* Dwarka Nath Mahto	53
Baij Nath Goenka *v.* Padmanand Singh...	848
Basanti Lal *v.* Chhedo Singh ...	1048
Birendra Kishore Manikya *v.* Akram Ali	439
Birendra Kishore Manikya *v.* Bhubaneswari	903
Birendra Kishore Manikya *v.* Roshan Ali	453
Chalho Singh *v.* Jharo Singh ...	995
Chhakauri Mahton *v.* Ganga Prasad ...	862
Deokali Koer *v.* Kedar Nath ...	704
Dinesh Chandra Roy Chowdhury *v.* Biraj Kamini Dassee	87
Dwarka Nath Roy *v.* Sarat Chandra Singh Roy	319
Eastern Mortgage and Agency Co., Ld., *v.* Purna Chandra Sarbagna ...	510
Harish Chandra Tewary *v.* Chandpur Company, Ld.	766
Hasun Molla *v.* Tasiruddin	393
Jati Kar *v.* Mukunda Deb	227
Jharula Das *v.* Jalandhar Thakur ...	887
Kalimuddin *v.* Meharui	563
Kesobati *v.* Mohan Chandra Mandal ...	1010
Mahammad Mehdi Hassan Khan *v.* Sheo Shankar Pershad Singh ...	353
Menajuddi Biswas *v.* Toam Mandal ...	881
Midnapore Zemindari Company, Ld. *v.* Naresh Narain Roy	220
Nand Kishore Singh *v.* Ram Gulam Sahu	1037
Nim Chand Saha *v.* Joy Chandra Nath ...	839
Purna Chandra Sarma *v.* Peary Mohan Pal Das	828
Radha Kanta Chakravarti *v.* Ramananda Shaha	513
Raghubar Sahi *v.* Protap Udoy Nath Sahi Deo	241
Raghunandan Ramanuja Das *v.* Bibhuti Bhushan Mukerjee	304
Raimoni Dassi *v.* Mathura Mohan Dey ...	1016
Rukminimayi Dasi *v.* Paran Chandra Bhera	341
Sarat Chandra Bose *v.* Secretary of State for India	1029
Sarat Chandra Ghose *v.* Shyam Chand Singh Roy...	663
Sewdeo Narain Singh *v.* Ajodhya Prosad Singh	1005
Trinayani Dasi *v.* Krishna Lal De ...	906

CIVIL RULES.

Abdul Karim Abu Ahmed Khan *v.* Abdus Sobhan Chowdhry	146
Begg, Dunlop & Co. *v.* Jagannath Marwari	104
East Indian Railway Company *v.* Sispal Lal	311
Kamini Debi *v.* Pramatha Nath Mookerjee	33
Langat Singh *v.* Janki Koer ...	265
Nepal Chandra Roy Chowdhury *v.* Niroda Sundari Ghose	506
Ram Charan Chanda Talukdar *v.* Taripulla	774
Rasik Lal Mandal *v.* Singheswar Rai ...	843
Surendra Mohini Debi *v.* Amaresh Chandra Chatterjee	687

LETTERS PATENT APPEALS.

Afazuddi Khan *v.* Prasanna Gain ...	138
Deb Narain Dutt *v.* Chairman of the Baruipur Municipality	141
Kailash Chandra Bose *v.* Girija Sundari Debi	925

ORIGINAL CRIMINAL.

Emperor *v.* Salimullah	487
Rudolf Stallmann, *In the matter of* ...	164

APPELLATE CRIMINAL.

	Page.		Page.
Kunja Bhuiya *v.* Emperor	896	Rati Jha *v.* Emperor	463
Lalit Chandra Chanda Chowdhury *v.* Emperor	119	Surendra Narayan Adhicary *v.* Emperer...	522
Mati Lal Chandra *v.* Emperor ...	1053	Suresh Chandra Sanyal *v.* Emperor ...	606

CRIMINAL REFERENCE.

Bhiku Hossein *v.* Emperor	1041	Pika Bewa *v.* Emperor	855

CRIMINAL REVISION.

Abdul Ghani *v.* Azizul Huq... ...	409	Kherode Chandra Roy Chowdhury *v.* Emperor	377
Ambar Ali *v.* Anjab Ali	238	Kudrutulla *v.* Emperor	781
Ambica Prasad Singh *v.* Gur Sahay Singh	560	Ram Pratap Nemani *v.* Emperor ...	968
Atiar Rai *v.* Emperor	476	Satish Chandra Sarkar *v.* Emperor ...	456
Baisnab Charan Majhi *v.* Gatinath Munshi	469	Sew Karan *v.* The Corporation of Calcutta	682
Bhagabat Shaha *v.* Sadique Ostagar ...	1050	Siva Sundari Chowdhrani *v.* Emperor ...	834
Gora Mian *v.* Abdul Majid	403	Tripendeswar Mitter *v.* Corporation of Calcutta	84
Jabbar Shaik *v.* Tamiz Shaik ...	931	Tunoo Mia *v.* Emperor	348
Jogendra Nath Mookerjee *v.* Mati Lal Chuckerbutty	885	Uttam Chand *v.* Emperor	344

MATRIMONIAL JURISDICTION.

Thompson *v.* Thompson 395

TABLE OF CASES CITED.

A

PAGE.

Abdul Gafur *v.* W. J. Albyn, I. L. R. 30 Calc. 713 106
Abdullah Sarkar *v.* Asraf Ali Mandal, 7 C. L. J. 152 ... 368
Abhiram Dass *v.* Gopal Dass, I. L. R. 17 Calc. 48 566
Achhamian *v.* Durga Churn Law, I. L. R. 25 Calc. 146 ... 373
Achhru Ram *v.* Meher Chand, S. A. No. 799 of 1875 (unreported) 873
Adams *v.* Angell, L. R. 5 Ch. D. 634 542
Adhur Chunder Banerjee *v.* Aghore Nath Aroo, 2 C. W. N. 589 ... 695
Agarjan Bibi *v.* Panaulla, I. L. R. 37 Calc. 687 ; 14 C. W. N. 779 516
Aghore Nath Mukerjee *v.* Srimati Kamini Debi, 11 C L. J. 461 ... 35, 851
Ahmad Yar Khan *v.* Secretary of State for India, I. L. R. 28 Calc. 693 ; L. R. 28 I. A. 211 ... ... 444, 643
Akhil Chandra Biswas *v.* Amyad Ali, S. A. 415 of 1903 (unreported) 843
Akhoy Chunder Bagchi *v.* Kalapahar Haji, I. L. R. 12 Calc. 406 ; L. R. 12 I. A. 198 586
Akram Ali *v.* Durga Prasanna Roy Chowdhuri, 14 C. L. J. 614, referred to 1016
Alangamonjori Dabee *v.* Sonamoni Dabee, I. L. R. 8 Calc. 637 ... 94
Alden *v.* Pearson, 69 Mass. 342 317
Aldred's Estate *In re*, 21 Ch. D. 228 42
Ali Gauhar Khan *v.* Bansidhar, I. L. R. 15 All. 407 distinguished 688
Ali Mahomed Khan *v.* Tarak Chandra Banerji, 13 C. W. N. 420 followed 781
Alimunnissa Chowdhurani *v.* Shama Charan Roy, I. L. R. 32 Calc. 749 851
Allcard *v.* Skinner, L. R. 36 Ch. D. 145 937
Amara *v.* Annamala, I. L. R. 31 Mad. 502 117
Amar Chand Kundu *v.* Nani Gopal Mukerjee, 12 C. W. N. 308 ... 300
Ambica Dat Vyas *v.* Nityanund Singh, I. L. R. 30 Calc. 687 ... 792
Ambika Prasad Singh *v.* Emperor, I. L. R. 35 Calc. 820, distinguished 463
Ameer Khan's Case, 6 B. L. R. 392 172
Amir Hassan Khan *v.* Sheo Baksh Singh, I. L. R. 11 Calc. 6, referred to 473
Amritrav Krishna Deshpande *v.* Balkrishna Ganesh Amrapurkar, I. L. R. 11 Bom. 488, referred to 473
Ananda Kishore *v.* Daije, I. L. R. 36 Calc. 726 ; 10 C. L. J. 189 373
Anand Rao *v.* Administrator General of Bombay, I. L. R. 20 Bom. 450 94
Ananta Narayana Ayyar *v.* Kuttalam Pillai, I. L. R. 22 Mad. 481 308
Anath Nath Deb *v.* Galstaun, I. L. R. 35 Calc. 661 73
Anonymous Reference, 12 W. R. (Cr.) 34 970

PAGE.

Antaji Keshav Tambe, *In re*, I. L. R. 18 Bom. 670 ... 631
Anundo Moyee Dassee *v.* Dhonendro Chunder Mookerjee, 14 Moo. I. A. 101 521
Arton, *In re*, [1896] 1 Q. B. 509 202
Arzan *v.* Rakhal Chunder Roy Chowdhry, I L. R. 10 Calc. 214, referred to 53
Asim Mandal *v.* Raj Mohan Das, 13 C. L. J. 532 273
Asmatunnessa Khatun Saheba *v.* Harendra Lal Biswas, I. L. R. 35 Calc. 904 ; 12 C. W. N. 721, referred to 513
Attorney-General *v.* Fedorenko, 27 T. L. R. 541 207
Aynsley *v.* Glover, L. R. 18 Eq. 544 75

B

Baban Mayacha *v.* Nagu Shravucha, I. L. R. 2 Bom. 19, relied on 53
Babbon Sheikh *v.* Emperor, I. L. R. 37 Calc. 340 distinguished ... 477
Badman, *Ex parte*, L. R. 45 Ch. D. 16 919
Bagram *v.* Khettra Nath Karformah, 3 B. L. R. (O. C.) 18, referred to 59
Bahadur *v.* Eradatullah Mallick, I. L. R. 37 Calc. 642 ... 465
Baijnath Singh *v.* Sukhu Mahton, I. L. R. 18 Calc. 534, distinguished 995
Bai Kesserbai *v.* Hunsraj Morarji, I. L. R. 30 Bom. 431 ... 336
Bai Rambai *v.* Bai Mani, I. L. R. 23 Bom. 234 939
Balai Mahto *v.* Nobin Manjhi, 7 C. W. N. 29 153
Balajit Singh *v.* Bhoju Ghose, I. L. R. 35 Calc. 117 ... 150
Balaram *v.* Solano, 8 B. L. R. 335 117
Baisnab Das Babaji *v.* Emperor, 12 C. W. N. 606 156
Balkishen *v.* Simpson, I. L. R. 25 Calc. 833 ; L. R. 25 I. A. 151 981
Balli Pande *v.* Chittan, I. L. R. 28 Al . 625 158
Bally Dobey *v.* Ganei Deo, I. L. R. 9 Calc. 388 1011
Balwant Singh *v.* Secretary of State for India, I. L. R. 25 All. 527 ; L. R. 30 I. A. 172 641
Bani Madhub Mitter *v.* Matungini Dassi, I. L. R. 13 Calc. 104, distinguished 766
Bank of Syria, *In re*, [1901] 1 Ch. 115, followed 810
Bapuji Raghunath *v.* Kuvarji Edulji Umrigar, I. L. R. 15 Bom. 400 745
Baranashi Pershad Chowdhury *v.* Jahori Lal, 8 C. W. N. 385 ... 539
Barindra Kumar Ghose *v.* Emperor, I. L. R. 37 Calc. 467 ... 120, 609
Barney, *In re*, [1894] 3 Ch. 562 42
Baroda Charan Dutt *v.* Hemlata Dassi, 13 C. W. N. 242 ... 229
Barrett, *Ex parte*, 19 L. J. Ch. 415 41
Barry *v.* Butlin, 2 Moo. P. C. 480 245
Basharutulla *v.* Uma Churn Dutt, I. L. R. 16 Calc. 794 ... 30
Bashi Chunder Sen *v.* Enayet Ali, I. L. R. 20 Calc 236 ... 521
Basiruddi *v.* Queen-Empress, I. L. R. 21 Calc. 827, referred to ... 781
Bates *v.* Townley, 1 Exch. 572 680
Bechi *v.* Ashanullah Khan, I. L. R. 12 All. 461, relied on ... 766
Beer Pertab Sahee *v.* Rajender Pertab Sahee, 12 Moo. I. A. 1 ... 729
Beg Raj Marwari *v.* Kundali Debya 8 C. W. N. 353 299
Begu Singh *v.* Emperor, I. L. R. 34 Calc. 551 776
Bejoy Singha Neogi *v.* Empress, 3 C. W. N. 463 152
Belagal Ramacharlu *v.* Emperor, I. L. R. 26 Mad. 471 ... 156

PAGE.

Belfast Water Commissioners, *In re*, L. R. 5 Eq. 63 ... 41
Beni Madhub Gorani *v.* Lal Moti Dassi, 6 C. W. N. 242 ... 290
Beni Pershad Koery *v.* Dudh Nath Roy, I. L. R. 27 Calc. 156 ... 446
Beni Prashad *v.* Puran Chand, I. L. R. 23 Calc. 262 ... 864
Beni Ram *v.* Nanhu Mal, I. L. R. 7 All. 102 ; L. R. 11 I. A. 181 272
Benoy Lal Roy Chowdhury *v.* Kamalapati Banerjee, 13 C. L. J. 505 1038
Benson *v.* MacMahon, 127 U. S. 457 203
Besset, *Ex parte*, 6 Q. B. 481 followed 164
Bethune *v.* Bethune, 63 L. T. 259 399
Bhabatarini Debya *v.* Peary Lal Sanyal, I. L. R. 24 Calc. 646 ... 95
Bhagwati *v.* Banwari Lal, I. L. R. 31 All. 82 689
Bhairab Pal *v.* Prem Chand Ghose, Civil Rule No. 411 of 1897 (unreported) 690
Bhajahari Pal *v.* Ram Lal Dass, 6 C. W. N. 63 300
Bhimacharya *v.* Ramacharya, I. L. R. 33 Bom. 452 ... 336
Bhimal Das *v.* Ganesha Koer, 1 C. W. N. 658 690
Bhiramali Sheikh Shikdar *v.* Gopi Kant Shaha, I. L. R. 24 Calc. 355 ; 1 C. W. N. 396 517
Bhugwan Das Khettry *v.* Nilkanta Ganguli, 9 C. W. N. 171 .. 223
Bhugwat Sahay *v.* Rai Pashupati Nath Bose, 10 C. W. N. 564 ... 1038
Bhyah Singh *v.* Bhyah Ugur Singh, 13 Moo. I. A. 373 ; 5 B. L. R. 293 98
Bibee Rukhum *v.* Shaikh Ahmed Hossein, 22 W. R. 443 ... 937
Bibi Jawahir Kumari *v.* Chatterput Singh, 2 C. L. J. 343 ... 667
Bibi Sharifan *v.* Mahomed Habibuddin, 13 C. L. J. 535, referred to 690, 881
Bidhu Bhusan Chatterji *v.* Annoda Churn Kanangui, 6 C. W. N. 883 152
Bijoy Gopal Mukerji *v.* Krishna Mahishi Debi, I. L. R. 34 Calc. 329 ; L. R. 34 I. A. 87 427
Binja Ram *v.* Raj Mohun Roy, I. L. R. 8 Calc. 282 792
Binoderam *v.* The Deputy Commissioner of Sonthal Pergunnahs, 7 W. R. 178 1012
Binoderam Sein *v* The Deputy Commissioner of Sonthal Pergunnahs, 6 W. R. 129 1012
Biraj Mohini Dassee *v.* Kedar Nath Karmakar, I. L. R. 35 Calc. 1010 289
Biribhadra Rath *v.* Kalpataru Panda, 1 C. L. J 388 referred to ... 664
Birch *v.* Birch, 8 P. D. 163 1012
Bir Chunder Manikya *v.* Rai Mohun Goswami, I. L. R. 16 Calc. 449 446
Bird *v.* Brown, 4 Exch. 786 ; 19 L. J. Exch. 154 919
Bishambar Nath *v.* Nand Kishore, I. L. R. 15 All. 56 ... 792
Bishen Doyal Rai *v.* Chedi Khan, 4 C. W. N. 560, distinguished ... 120
Bishun Priya Chowdhurani *v* Bhaba Sundari Debya, I. L. R. 28 Calc. 318 853
Bissell *v.* Axtell, 2 Vern. 47 594
Bisu Haldar *v.* Probhat Chunder Chuckerbutty, 6 C. L. J. 127 ... 404
Board of Street Opening, *In re*, 35 N Y. Sup. 409 ; 89 Hun. 525 45
Bolton Partners *v.* Lambert, L. R. 41 Ch D 295 ... ... 91?
Bowman *v.* Teal, 23 Wendell N. Y 306 ; 35 Am. Dec. 562 ... 317

PAGE.

Bramwell *v.* Bramwell, 3 Hag. Eccl. Rep. 618, approved and followed 395
Bright *v.* Durnell, 4 Dowl. 756 680
Brisbane *v.* Dacres, 5 Taunt. 143 594
Broja Nath Pal *v.* Dasmoney Dasee, 2 C. L. R. 589 565
Brojender Coomar *v.* Bromomoye Chowdhrani, I. L. R. 4 Calc. 885 801
Brojo Gobind Shaha *v.* Goluck Chunder Shaha, I. L. R. 9 Calc. 127, followed 789
Brown *v.* Cole, 14 Sim. 427, distinguished 829
Brown *v.* Foot, 17 Cox C. C. 509, followed 682
Brown *v.* Rome Ry. Co., 86 Ala. 206 ; 5 South. 195 45
Bryant *v.* United States, 167 U. S. 104 203
Bunwari Lal *v* Daya Sunker Misser, 13 C. W. N. 815, followed ... 907
Burjorji Cursetji Panthaki *v.* Muncherji Kuverji, I. L. R 5 Bom. 143 293
Burlington Ry. Co. *v.* Thompson, 31 Kan. 180 ; 47 Am. Rep. 497 116
Burnskill *v.* Caird, L. R. 16 Eq. 493 42
Burramoollah, *In he matter of v.* Nil Chand Dutt, 17 W. R. 484 1039
Byjnath Dutt Jha *v.* Mussamat Putsohee Dobain 20 W. R. 36 ... 292

C

Calder *v.* Halket, 3 Moo. P. C. 28 ; 2 Moo. I. A. 293 ... 960
Cally Nath Naugh *v.* Chunder Nath Naugh, I. L. R. 8 Calc. 378 94
Campbell, *Ex parte* L. R. 5 Ch. App. 703 40
Carlill *v.* The Carbolic Smoke Ball Co., [1892] 2 Q. B. 484 referred to 968
Carron Iron Co. *v.* Maclaren, 5 H. L. C. 416 117
Castioni, *In re*, [1891] 1 Q. B. 149 179
Chairman of Giridih Municipality *v.* Srish Chandra Mozumdar, I. L. R. 35 Calc. 859 143
Chaitan Patgosi Mahapatra *v.* Kunja Behary Patnaik, I. L. R. 38 Calc 832 ; 15 C. W. N. 863 243
Chalho Singh *v.* Jharo Singh, I. L. R. 39 Calc. 995 1007
Chamanlal *v.* Bapu Bhai, I. L. R. 22 Bom. 669 850
Chandra Kant Ghose, *In the matter of*, 3 C. W. N. 3 ... 464
Chaughatta *v.* Mokham Din, 28 Punj. Rec. 321 428
Charu Chandra Das *v.* Narendra Krishna Chakravarti, 4 C. W. N. 367, distinguished 120
Chedambaram Chetty *v.* Karunalyavalangapuly Taver, 3 Mad. H. C. 342 293
Chetti *v.* Chetti, [1909] P. 67 411
Chettikulam Reddiar *v.* Chetti Kulam Reddiar, I. L. R. 28 Mad. 377 864
Chetwynd *v.* Allen, [1899] 1 Ch. 353 542
Chintamoni Aditya *v.* Haladhar Maiti, 2 C. L. J. 153 ... 825
Chintaman Narayan *v.* Madhavrav Venkatesh, 6 Bom. H. C. 29 ... 746
Chooni Lall *v.* Madhoram, I. L. R. 36 Calc. 388 ; 13 C. W. N. 297, dissented from 670

PAGE.

Chundee Churn Roy *v.* Shib Chunder Mundul, I. L. R. 5 Calc. 945 55
Chunilal Mancharam *v.* Manishankar Atmaram, I. L. R. 18 Bom. 616 793
City of London Brewery Co. *v.* Tennant, L. R. 9 Ch. Ap. 212 ... 74
Clarke *v.* Clarke, L. R. 1 Ch. App. 16 74
Clarke *v.* Thornton, 35 Ch. D. 307 41
Clergy Orphan Corporation, *In re*, [1894] 3 Ch. 145 ... 48
Clive Jute Mills Co. *v.* Ebrahim Arab, I. L. R. 24 Calc. 177 ... 573
Cobbet *v.* Kilminster, 4 F. & F. 490, referred to 606
Cochrane *v.* Cochrane, 27 T. L. R. 107 399
Collector of Ratnagiri *v.* Vyankatrav Narayan Surve, 8 Bom. H. C. (A. C.) 1 632
Collector of Sea Customs *v.* Punnear Chithambaram, I. L. R. 1 Mad. 89 641
Collins *v.* Collins, L. R. 9 A. C. 205 399
Colls *v.* Home and Colonial Stores, Ld., [1904] A. C. 179, considered 59
Cooch *v.* Goodman, 2 Q. B. 580 1019
Cook *v.* Sprigg, 68 L. J. P. C. 144 626
Cooke *v.* Cooke, 3 Sw. & Tr. 126, approved and followed ... 395
Coomber *v* Coomber, [1911] 1 Ch. 273 933
Cooper *v.* Slave, 6 H. L. Cas. 746, referred to 246
Counhaye, *In re*, L. R. 8 Q. B. 410 202
Cousens *v.* Cousens, 34 L. J., P. & M. 139 398
County Life Assurance Co., *In re*, L. R. 5 Ch. App. 288, followed 810
County of Gloucester Bank *v.* Rudry Merthyr Colliery Co., [1895] 1 Ch. 629, followed 810
Cresswell *v.* Jackson, 2 F. & F. 24, referred to 606
Crisp *v.* Watson, I. L. R. 20 Calc. 689 744
Crosby *v.* Hetherington, 4 Man. & Gr. 933 115
Cross *v.* Brown, 19 R. I. 220 116
Crowley's Case, 2 Swans. 1 198

D

Dalegobind Chowdhry *v.* Dhanu Khan, I. L. R. 25 Calc. 559 ... 151
Dalmir Puri *v.* Khodadad Khan, I. L. R. 36 Calc. 923, distinguished 560
Darbar Ala *v.* Khachar Oghad, I. L. R. 32 Bom. 348 ... 865
Dasvandi *v.* Mahant Krishen Dev, 46 Punj Rec. 121 ... 428
Davie's Estate, *In re*, 3 De G. & J. 144 42
Dawood *v.* Moona, P. J. L. B. 56 118
Day *v.* Paupierre, 13 Q. B. 802 115
Debendra Nath Sen *v.* Mirza Abdul Samed Seraji, 10 C. L. J. 150, referred to 514
Delhi and London Bank *v.* Hem Lall Dutt, I. L. R. 14 Calc. 839, referred to 59
Delhi and London Bank *v.* Wordi, I. L. R. 1 Calc. 249 ... 746
Dent *v.* Dent, 34 L. J. P. & M. 118 398
Deputy Legal Remembrancer *v.* Upendra Kumar Ghose, 12 C. W. N., 140 not followed 782

PAGE.

Deva Siiamani *v.* Palaniyappa, 20 Mad. L. J. 969 246
Devine *v.* Wilson, 10 Moo. P. C. 502 246
Dharani Kanta Lahiri *v.* Gaber Ali Khan, I. L. R. 30 Calc. 339 ... 306
Dharmodas Das *v.* Nistarini Dasi, I. L. R. 14 Calc. 446 ... 939
Dhuronidhur Sen *v.* The Agra Bank, I. L. R. 5 Calc. 86 ... 222
Dibbins *v.* Dibbins, [1896] 2 Ch. 348 919
Debi Prasad *v.* Sheodat Rai, I. L. R. 30 All. 41 156
Dinendro Nath Sannyal *v.* Ram Coomar Ghose, L. R. 8 I. A. 65 ; I. L. R. 7 Calc. 107 521
Dinobundhu Shaw Chowdhry *v.* Jogmaya Dasi, I. L. R. 29 Calc. 154 ; L. R. 29 I. A. 9, followed 528
Doe *v.* Godwin 1 Dow. & R. 259 309
Doe *v.* Stone, 3 C. B. 176 521
Doe *v.* Vickers, 4 Ad. & E. 782 521
Donellan *v.* Read, 3 B. & Ad. 899 292
Doolubdass *v.* Ramloll, 5 Moo. I. A. 109 626
Doswell *v.* Impey, 1 Barn. & Cres. 163 959
Dowlat Koer *v.* Ramphul Das, I. L. R. 25 Calc. 459 ... 259
Dowlat Koer *v.* Siva Pershad Pandit, 10 Ind. Ca. 615, followed 560
Drake *v.* Trefusis, L. R. 10 Ch. App. 364 36
Driver *v.* Queen-Empress, I. L. R. 25 Calc. 798 156
Durant *v.* Durant, 1 Hag. Eccl. Rep. 733, approved and followed 395
Durbar Kachar *v.* Kachar Harsur, I. L. R. 32 Bom. 348 ... 864
Durga Prasad Singh *v* Rajendra Narain Bagchi, I. L. R. 37 Calc. 293, approved 284

E

East Indian Railway Company *v.* The Bengal Coal Co., I. L. R. 1 Calc. 95 744
East Lincolnshire Railway Company, *In re*, 1 Sim. N. S. 260 ... 45
Ecclesiastical Commissioners *v.* Commissioners of Sewers of the City of London, L. R. 14 Ch. D. 305 74
Ekram Singh, *In the matter of the petition of*, 3 C. W. N. 297 ... 152
Eliza Smith *v.* Secretary of State, I. L. R. 3 Calc. 340 271
Elmira Shepherd, *In the case of*, 8 Blatchford 341 ; 8 Fed. Cas. 579 317
Emperor *v.* Debendra Nath Bose, 1 C. L. J. 632 156
Emperor *v.* Haji Shaik Mahomed Shustari, I. L. R. 32 Bom. 10, distinguished 344
Emperor *v* Hari Singh, I. L. R. 28 All. 100, followed ... 377
Emperor *v.* Jusub Ally, I. L. R. 29 Bom. 386 970
Emperor *v.* Purushottam Kara, I. L. R. 26 Bom. 418, referred to 781
Emperor *v.* Ram Baran Singh, I. L. R. 28 All. 406 156
Emperor *v.* Serhmal, (1908) All. W. N. 102 778
Emperor *v.* Sourindra Mohan Chuckerbutty, I. L. R. 37 Calc. 412, distinguished 120
Emperor *v.* Tribhovandas, I. L. R. 26 Bom 533 970
Emperor *v.* Vinayak Savarkar, 13 Bom. L. R. 296 ... ... 206.
Empress *v.* Indarman, I. L. R. 3 All. 837, followed 377
Empress *v.* Ketabdi Mundul, I. L. R. 4 Calc. 764 855
Erasala Chetty *v.* Addepally Chetty, I. L. R. 31 Mad. 472 ... 864

PAGE.

Eshan Chunder Roy *v.* Monmohini Dassi, I. L. R. 4 Calc. 683, referred to 227
Eyre *v.* Countess of Shaftesbury, 2 P. W. 103 ; 1 White & Tud. L. C. 495 309

F

Fakir Rawat *v.* Emambaksh, B. L. R. Sup. Vol. 35 ; W. R. F. B. 143, followed 915
Farez, *In re*, 7 Blatchford 345 ; 8 Fed. Cas. 4645 218
Faversham Charities, *In re*, 5 L. T. 787 47
Fischer *v.* Secretary of State, I. L. R. 22 Mad. 270 ; L. R. 26 I. A. 16 373
Fishmonger's Case, 1 Dick. 163 73
Fitzgerald, *In re*, 52 L. J. Ch. 662 98
Fitzerald *v.* Mellersh, [1892] 1 Ch. 385 831
Forester *v.* Secretary of State for India, L. R. I. A. Sup. Vol. 10 ; 12 B. L. R. 120 644
Fowler *v.* Wyatt, 24 Beav. 232 594

G

Garrick *v.* Lord Camden, 14 Ves. 372 98
General Horticultural Company, *In re*, 32 Ch. D. 512 ... 116
Gerard's Settled Estate, *In re*, [1893] 3 Ch. 252 43
German Bank *v.* American Fire Insurance Company, 83, Iowa 491 ; 32 Am. St. Rep. 316 116
Ghulam Bakhsh *v.* Massama, 28 Punj Rec. 109 428
Ghulam Khan *v.* Muhammad Hassan, I. L. R. 29 Calc. 167 ... 825
Giridhari Marwari *v.* Emperor, 12 C. W. N. 822, followed ... 238
Girija Sankar Ray *v.* Binode Sheikh, 5 C. L. J. 222 779
Girish Chunder Ghose *v.* Queen-Empress, I. L. R. 20 Calc. 857, distinguished 477
Gnanasambanda Pandara Sannadhi *v.* Velu Pandaram, I. L. R. 23 Mad. 271 ; L. R. 27 I. A. 69 894
Gobinda Ram Mondal *v.* Bhola Nath Bhatta, I. L. R. 15 Calc. 432 273
Gobind Lal Roy *v.* Ramjanam Misser, I. L. R. 21 Calc. 70 ; L. R. 20 I. A. 165 987
Gojabai *v.* Shrimant, I. L. R. 17 Bom. 114 334
Gokaldas Gopaldas *v.* Puranmal Premsukhdas, I. L. R. 10 Calc. 1035 ; L. R. 11 I. A. 126 540
Gokuldoss *v.* Rambux Seochand, L. R. 11 I. A. 126 ; I. L. R. 10 Calc. 1035 554
Golab Sao *v.* Chowdhury Madho Lal, 2 C. L. J. 384 ... 368
Golapdy Sheikh *v.* Queen-Empress, I. L. R. 27 Calc. 979 ... 119
Gonesh Chunder Sikdar *v.* Queen-Empress, I. L. R. 24 Calc. 157, approved 1053
Goodall *v.* The Mussoorie Bank, Limited, I. L. R. 10 All. 79 ... 222
Gooroopersad Khoond *v.* Juggutchunder, 8 Moo. I. A. 166, followed 1037
Gopal Chandra Chakravarti *v.* Preo Nath Dutt, I. L. R. 32 Calc. 175 226
Gopal Lal *v.* Benarasi Pershad Chowdhry, I. L. R. 31 Calc. 428 544

PAGE.

Gopinath Birbar *v.* Goluck Chunder Bose, I. L. R. 16 Calc. 292n... 1038
Gopi Mohan *v.* Doybaki, I. L. R. 19 Calc. 13 109
Gora Chand Lurki *v.* Makhan Lal Chakravarti, 6 C. L. J. 404 ... 893
Gour Mohun Gouli *v.* Dinonath Karmokar, I. L. R. 25 Calc. 49 ... 706
Gour Sundar Lahiri *v.* Hem Chunder Chowdhury, I. L.R. 16 Calc. 355 521
Governors of Norfolk Clergy, *Ex parte*, (1882) All. W. N. 53 ... 47
Gowan *v.* Christie, L. R. 2 Sc. App. 273 292
Gowri Koer *v.* Audh Koer, I. L. R. 10 Calc. 1087 850
Grant *v.* Secretary of State for India, 46 L. J. C. P. 681 ; L. R. 2 C. P. D. 445 644
Grepe *v.* Loam, 37 Ch. D. 168 276
Gurdeo Singh *v.* Chandrikah Singh, I. L. R. 36 Calc. 193, referred to 368, 664

H

Habibur Rahaman *v.* Munshi Khodabux, 11 C. W. N. 195 ... 779
Hall *v.* Hall, L. R. 8 Ch. App. 430, followed 933
Halletts' Estate, *In re*, 13 Ch. D. 696 970
Hamijuddi Mondal *v.* Damodar Ghose, 10 C. W. N. 1026 ... 776
Hammersmith Rent charge, *In re*, 4 Exch. 87, referred to ... 881
Hansraj *v.* Sundar Lal, I. L. R. 35 Calc. 648 ; L. R. 35 I. A. 88 ... 825
Haranund Roy Chetlangia *v.* Ram Gopal Chetlangia, I. L. R. 27 Calc. 639 ; L. R. 27 I. A. 1 176
Hara Prasad Das *v.* Ram Narain Chowdhury, 11 C. L. J. 22 ... 290
Harding *v.* Tingey, 34 L. J. Ch. 13 831
Hari Krishna Mahanti *v.* Bishun Chandra Mahanti, 7 C. L. J. 426 243
Harichand *v.* Fakir Sadruddin, 3 Bom. L. R. 841 163
Harilal Buch, *In re*, I. L. R. 22 Bom. 949 959
Hari Narayan Singh Deo *v.* Sriram Chakravarti, I. L. R. 37 Calc. 723 ; L R. 37 I. A. 136 followed 697
Harish Chandra Tewary *v.* Chandpore Company, Limited, I. L. R. 30 Calc. 961 223
Hari Singh *v.* Jadu Nandan Singh, I. L. R. 31 Calc. 542 ; 8 C. W. N., 458 referred to 969
Harkhoo Singh *v.* Bansidhur Singh, I. L. R. 25 Calc. 876 ... 986
Harris *v.* Newton, 46 L. J. Ch. 268 98
Harrop's Estate, *In re*, 3 Drew. 726 45
Hart *v.* Anthony, 15 Pickering 445 115
Hartington, *Ex parte*, 32 L. J. 243 ; 23 W. R. 484 43
Hatton *v.* Foster, L. R. 3 Ch. App. 505 98
Hatton *v.* Harris, [1892] A. C. 547 274
Hayat Muhammad *v.* Ala Baklish, 38 Punj. Rec. 54 ... 428
Hem Chandra Chowdhury *v.* Kali Prasanna Bhaduri, I. L. R. 30 Calc. 1033 ; L. R. 30 I. A. 177 ... ... 997, 1008
Hensloe's Case, 9 Coke 36 98
Herres, *In re*, 33 Fed. Rep. 165 201
Higgins *v.* Betts, [1905] 2 Ch. 210. considered 59
Hijjoo *v.* Meer Mahomed, 2 Punj. Rec. 113 428
Hiralal *v.* Chandrabali, 13 C. W. N. 9 ... ... 845, 876
Hobson's Trust, *In re*, 7 Ch. D. 708 47
Hobson's Trust, *In re*, 47 L. J. Ch. 310 47

PAGE.

Holl-ick, *In re*, 2 B. L. R. 108 ; 10 W. R. 447 105
Hope *v.* Evered, L. R. 17 Q. B. D. 338 957
Hori Das Mal *v.* Mahomed Jaki, I. L. R. 11 Calc. 434 ... 57
Houlden *v.* Smith, 19 L. J. (N. S.) Q. B. 170 959
Hughes *v.* Howard, 25 Beav. 575 521
Huguenin *v.* Baseley, 14 Ves. 273, followed 933
Huguet, *Ex parte*, 29 L. T. 41 202
Hurdwary Mull *v.* Ahmed Musaji Selaji, 13 C. W. N. 63, dissented from 670
Husaini Khanam *v.* Husain Khan, I. L. R. 29 All. 471 ... 830
Hussain Khan *v.* Nateri Srinivasa, 6 Mad. H. C. 356 ... 632

I

Idugazi Doctor *v.* Chandra Kali Sundrani, 8 C. W. N. 139 ... 279
Imam Ali *v.* Baijnath Ram Sahu, I. L. R. 33 Calc. 613 ... 546
Ireland *v.* Livingstone, L. R. 5 H. L. 395 684
Ishan Chandra Mitter *v.* Raja Ram Ranjan Chakarbutty, 2 C. L. J. 125 446
Ishan Chunder Sirkar *v.* Beni Madhub Sirkar, I. L. R. 24 Calc. 62 222, 690
Ishri Singh *v.* Baldeo Singh, I. L. R. 10 Calc. 792 ; L. R. 11 I. A. 135 729

J

Jafar Husen *v.* Ranjit Singh, I. L. R. 21 All. 4 543
Jafar Mandol *v.* Jaribullah Sahu, 9 C. W. N. 551 156
Jagadamba Chaudhrani *v.* Dakhina Mohan Ray Chaudhri, I. L. R. 13 Calc. 308 ; L. R. 13 I. A. 84 427
Jagadindra Nath Roy *v.* Hemanta Kumari Debi., I. L. R. 32 Calc. 129 ; L. R. 31 I. A. 203 38
Jagannath *v.* Ranjit, I. L. R. 25 Calc. 354 ... ... 229, 339
Jagannath Das *v.* Birbhadra Das, I. L. R. 19 Calc. 776 ... 228
Jagarnath Marwari *v.* Kartick Nath Pandey, 7 C. L. J. 436 ... 689
Jaggeswar Dutt *v.* Bhuban Mohan Mitra, I. L. R. 33 Calc. 425 515
Jahar *v.* Kamini Debi, I. L. R. 28 Calc. 238 109
Jai Kumar *v.* Gauri Nath, I. L. R. 28 All. 718 864
Jai Ram *v.* Kuverbai, I. L. R. 9 Bom. 491 94
Janglubai *v.* Jitha Appaji, I. L. R. 32 Bom. 409 322
Jarratt *v.* Aldam, L. R. 9 Eq. 463 444
Jatindra Mohan Tagore *v.* Ganendra Mohan Tagore, 9 B. L. R. 377 ; L. R. I. A. Sup. Vol. 47 94
Javannal *v.* Mutabai, I. L. R. 14 Bom. 516 626
Jeapes *v.* Jeapes, 89 L. T. 74 399
Jerard's Settled Estate, *In re*, [1893] 3 Ch. 252 36
Jharu Jola *v.* Sukh Deo Singh, 3 C. L. J. 87, distinguished ... 120
Jhumuck Jha *v.* Pathuk Mandal, I. L. R. 27 Calc. 798 ... 119
Jivraji *v.* Pragji, I. L. R. 10 Mad. 51 274
Jogendra Nath Sirkar *v.* Gobinda Chandra Dutta, 12 C. W. N. 310 299
Johnston & Sons *v.* Dove, 3 Rettie 202 315
Jolly *v.* Kine, [1907] A. C. 1, followed 59
Joobraj Singh *v.* Tookun Singh, 14 W. R. 476 918

PAGE.

Joy Coomar *v* Bundhoo Lall, I. L. R. 19 All. 302, followed ... 477
Joy Narain Jana *v*. Upendra Narain Ray, 13 C. L. J. 216 ... 776
Juggernauth Dass *v*. Brijnath Dass, I. L. R. 4 Calc. 322 ... 745
Jumna Dass *v*. Harcharan Dass, I. L. R. 38 Calc. 405 ... 117

K

Kachi Kaliyana Rengappa *v*. Kachi Yuva Rengappa, I. L. R. 28 Mad. 508 ; L. R. 32 I. A. 261 729
Kaine, *Ex parte*, 3 Blatchford 1 ; 14 Fed. Cas. 7597 ... 201
Kaki Subbanadri *v*. Muthu Rangayya. I. L. R. 32 Mad. 532, discussed 1016
Kali Prosanno Ghose *v*. Rajani Kant Chatterjee, I. L. R. 25 Calc. 141 825
Kamaraju *v*. The Secretary of State for India, I. L. R. 11 Mad. 309 243
Kameshwar Pershad *v*. Chairman of Bhabua Municipality, I. L. R. 27 Calc. 849 143
Kanai Lal Jowhari *v*. Kamini Debi, 1 B. L. R. 31 (note), referred to 933
Kanakku Nagalinga Naik *v*. Nagalinga Naik, I. L. R. 32 Mad. 510 825
Kanemar *v*. Krishna, I. L. R. 31 Mad. 161 863
Kanhai Lal *v*. Chhadammi Lal I. L. R. 31 All. 48 778
Kantiram *v*. Wali Sahu, 2 B. L. R. 330 ; 11 W. R. 251 ... 917
Karamat Khan *v*. Mir Ali Ahmed, (1891) All. W. N. 121, not followed 688
Karam Khan *v*. Daryai Singh, I. L. R. 5 All 331 706
Kari Singh *v*. Tufani Dhanuk, 14 C. W. N. 212 158
Kartick Nath Pandey *v*. Tilukdhari Lall, I. L. R. 15 Calc. 667 ... 109
Kashi Chunder Dass *v*. Hurkishore Dass, 19 W. R. Cr. 47 ... 155
Kashi Gir *v*. Jogendro Nath Ghose, I. L. R. 27 All. 136, discussed 1016
Kashi Ram *v*. Sardar Sing, I. L. R. 28 All. 157 543
Kasturi Chetti *v*. Deputy Collector, Bellary, I. L. R. 21 Mad. 269, referred to 907
Kearney *v*. Kean, 3 Cana. Sup. Ct. Rep. 332 45
Kedar Nath *v*. Luchmun, 1 C. L. R. 336 118
Kedar Nauth Doss *v*. Protap Chunder Doss, I. L. R. 6 Calc. 626 890
Kedar Nath Sen *v*. Uma Charan, 6 C. W. N. 57 689
Kelland *v*. Fulford, 6 Ch. D. 491 45
Kellie *v*. Fraser, I. L. R. 2 Calc. 445 744
Kelly *v*. Kelly, L. R. 2 P. & D. 59 399
Kemble *v*. Farran, 3 C. & P. 623 1002
Kemp *v*. Falk, L. R. 7 A. C. 573 573
Ker *v*. Illinois, 119 U. S. 436 206
Khalilul Rahman *v*. Gobind Pershad, I. L. R. 20 Calc. 328 ... 863
Kine *v*. Jolly, [1905] 1 Ch. 480, considered 59
King *v*. Patteson. 4 B & Ad. 9 957
King-Emperor *v*. Basiruddin Mollah, 7 C. W. N. 746 ... 153
King-Emperor *v*. Chief Officer of the "Mushtari", I. L. R. 25 Bom. 636, dissented from 487
Kinkin *v*. Naga Kyaw, (1907) U. B. R. 13 118
Knill *v*. Dumergui, [1911] 2 Ch. 199 1012

PAGE.

Komaruddi *v.* Sreenath Chowdhury, 8 C. W. N. 136 279
Kowsulliah Sundari Dasi *v.* Mukta Sundari Dassi, I. L. R. 11 Calc. 588 1001
Kripali Singh *v.* Pairoo Raut, 11 C. L. J. 86 690
Krishnai *v.* Shripati, I. L. R. 30 Bom. 333 337
Krishna Lal Saha *v.* Bhairab Chandra Rahat, 9 C. W. N. ccxlviii, referred to 513
Krishna Prasad Nag *v.* Maizuddin Biswas, I. L. R. 17 Calc. 707 745
Krishna Sami *v.* Engel, I. L. R. 8 Mad. 20 118
Krishna Satapasti *v.* Sarasvatula Sambasiva Row, I. L. R. 31 Mad. 177 689
Kuriyali *v.* Mayan, I. L. R. 7 Mad. 255, not followed ... 299
Kushaba Rangole *v.* Narayan Babaji Rangole, I. L. R. 19 Bom. 32 677
Kustoora Koomaree *v.* Binoderam Sein, 4. W. R. Mis. 5 ... 1015
Kyd *v.* Mahomed, I. L. R. 15 Mad. 150 669

L

Labrador Company *v.* The Queen, [1893] A. C. 104 452
Lachmi Dai Koori *v.* Asman Singh, I. L. R. 2 Calc. 213 ... 863
Lakhatulla *v.* Bishwambhar Roy, 12 C. L. J. 646 293
Lakhmidas Hira Chand *v.* The Great Indian Peninsular Railway Company, 4 Bom. H. C. O. C. 129 1031
Lakshmipathi *v.* Kandasami, I. L. R. 16 Mad. 54 729
Lala Parbhu Lall *v.* Myne, I. L. R. 14 Calc. 401 521
Lalit Chandra Chanda Chowdhury *v.* Emperor, I. L. R. 39 Calc. 119 609
Lalit Chandra Neogi *v.* Tarini Pershad Gupta, 5 C. W. N. 335, followed 560
Lalji, *In re*, I. L. R. 19 All. 302 481
Lallu Bhai *v.* Mankuvar Bai, I. L. R. 2 Bom. 388 329
Lal Mohan Mandal *v.* Kali Kishore Bhuimali, I. L. R. 38 Calc. 293 900
Land Mortgage Bank *v.* Sudurudeen Ahmed, I. L. R. 19 Calc. 358 745
Latchman *v.* Maddan Mohun, I. L. R. 6 Calc. 513 109
Lathropp's Charity, *In re*, L. R. 1 Eq. 467 ; 35 Beav. 297 ... 47
Lawrie *v.* Lees, 7 App. Cas. 19 274
Lea *v.* Charrington, L. R. 23 Q. B. D 45 957
Ledgard *v.* Bull, I. L. R. 9 All. 191 ; L. R. 13 I. A. 134 ... 373
Leigh's Estate, *In re*, L. R. 6 Ch. App. 887 36
Lekna *v.* Thakri, 30 Punj. Rec. 124 428
Lelanund Singh *v.* Government of Bengal, 6 Moo. I. A. 101 ... 700
Lesinsky *v.* Great Western Despatch, 10 Mo. App. 134 ... 317
Levinger *v* The Queen, L. R. 3 P. C. 282 173
Lilabati Misrain *v.* Bishun Chobey, 6 C. L. J. 621 893
Lindsay, *In re*, I. L. R. 4 Mad. 121, not followed 560
Liverpool Borough Bank *v.* Turner, 30 L J. Ch. (N. S.), 379 ... 957
Lockwood *v.* Cooper, [1903] 2 K. B. 428, referred to ... 968
Loknath *v.* Bissessarnath, I. L. R. 27 Calc. 103 627
London County Council, *In re*, 84 L. T. 808 50
Loughrey *v.* Swan, 23 L. T. R. Ir. 54 275
Lucas *v.* De la Cour, 1 M. & S. 249 1002
Lucas *v* Harris, 18 Q. B. D. 127 1012
Luchmiput Singh *v.* Sadatulla Nusso, 12 C. L. R. 382 ... 55

PAGE

Lutf Ali Khan *v.* Asgur Reza, I. L. R. 17 Calc. 455, distinguished 1037
Lyell *v.* Kennedy, L. R. 14 A. C. 437 919
Lyon *v.* Home, L. R. 6 Eq. 655, referred to 933

M

MacDonell, *In re*, 11 Blatchford 79 ; 16 Fed. Cas. 8771 ... 218
Macdonnell, *In re*, 11 Blatchford, 170 ; 16 Fed. 8772 ... 201
McDowell *v.* Ragava Chetty, I. L. R. 27 Mad. 71 864
Madan Chandra Kapali *v.* Jaki Karikar, 6 C. W. N. 377, overruled 278
Madhusudan Das *v.* Gobinda Pria Chowdhurani, I. L. R. 27 Calc. 34 690
Madras Railway Company *v.* The Zemindar Carvetinagaram, 14 B. L. R. 209 ; L. R. 1 I. A. 364 442
Maganlal Mulji *v.* Dashi Mulji Bhaichand, I. L. R. 25 Bom. 631 689
Ma Gywe *v.* Ma Thi Da, 2 Upper Burma Rul. (1892-96) p. 194 ... 496
Mahabir Prasad *v.* Basdeo Singh, I. L. R. 6 All. 234 ... 864
Mahadeo Kunwar *v.* Bisu, I. L. R. 25 All. 537 156
Mahadeo Singh *v.* Zitannissa, 7 B. L. R. 45 note ; 11 W. R. 169 920
Mahammad Afzal Khan *v.* Ghulam Kasim Khan, I. L. R. 30 Calc. 843 ; L. R. 30 I. A. 190 727
Maharaja Luchmissur Singh *v.* Mussamat Dakho, I. L. R. 7 Calc. 708 293
Maharaja of Benares *v.* Ramkumar Misir, I. L. R. 26 All. 611, referred to 843
Maharana Shri Jaswatsangji Fatesangji, I. L. R. 22 Bom. 988 ... 55
Maharanee of Lahore, *In re*, (1848), Taylor 428 173
Mahomed Hossein *v.* Moshin Ali, 6 B. L. R. 41 ; 14 W. R. F. B. 1 920
Mahomed Jackariah & Co. *v.* Ahmed Mahomed, I. L. R. 15 Calc. 109 957
Mahomed Jan *v.* Ganga Bishun Singh, I. L. R. 38 Calc. 537 ; L. R. 38 I. A. 80 989
Mahomed Mozuffer Hossein *v.* Kishori Mohun Roy, I. L. R. 22 Calc. 909 ; L. R. 22 I. A. 129 521
Mahomed Wahiduddin *v.* Hakiman, I. L. R. 25 Calc. 757 ... 825
Mahon *v.* Justice, 127 U. S. 700 206
Makham Lal Roy *v.* Barada Kanta Roy, 11 C. W. N. 512 ... 154
Malkarjun *v.* Narhari, I. L. R. 25 Bom. 337 ; L. R. 27 I. A. 216 546
Mangalsawami *v.* Subbia Pillai, I. L. R. 34 Mad. 64 ... 292
Maniram Seth *v.* Seth Rupchand, I. L. R. 33 Calc. 1047 ... 795
Manly *v.* Patterson, I. L. R. 7 Calc. 339 1038
Mannu Singh v. Umadat Pande, I. L. R. 12 All. 523 ... 937
Marcy *v.* Warner, 17 La. Ann. 34 317
Margate Pier Company *v.* Hannam, 3 B. & Ald. 266 ... 957
Marsh *v.* Keith, 1 Dr. & Sm. 342 ; 62 E. R. 410, followed ... 704
Martin *v.* Kelly, L. R. 5 C. L. 404 114
Maseyk *v.* Steel, I. L. R. 14 Calc. 661 109
Mathews *v.* Wilson, (1883) All. W. N. 111 43
Maund *v.* Allies, 5 Jur. 860 594
Ma Wun Di *v.* Ma Kin, I. L. R. 35 Calc. 232 ; L. R 35 I. A. 41 496

PAGE.

Mayor of Sheffield *v.* Trustees of St. Williams' School, [1903] 1 Ch. 208 47
Mears *v.* New York Railway Company, 52 Atl. 610; 56 L. R. A. 884 317
Megh Lal *v.* Giridhari Singh, 5 C. L. J. 208 628
Mehi Singh *v.* Mangal Khandu, I. L. R. 39 Calc. 157 ... 1051
Mellor *v.* Swire, 30 Ch. D. 239 274
Mennier, *In re*, [1894] 2 Q. B. 415 202
Mersey Docks *v.* Cameron, 11 H. L. C. 443 39
Midland Counties Ry. Co. *v.* Oswin, 1 Coll. 80; 13 L. J. Ch. 209 45
Mi Ka *v.* Maung Thet, Selected Judgments from Upper Burmah Rul. (1872-1892), p. 6 502
Mi Kine Gale *v.* Mi Kin Gyi, (1910) Selected Judgments from Upper Burma Rul. 42 502
Mi Kin Gale *v.* Mi Kin Gyi, (1910) Upper Burma Rul. 42 ... 501
Miller *v.* Dell, [1891] 1 Q. B. 468 548
Milne *v.* Gilbert, 2 De G. M. & G. 715 98
Minakshi *v.* Subramanya, I. L. R. 11 Mad. 26; L. R. 14 I. A. 160 373
Miran Bakhsh *v.* Ala Ditta, 29 Punj. Rec. 482 428
Mir Sarwarjan *v.* Fakhruddin Mahomed Chowdhuri, I. L. R. 39 Calc. 232; L. R. 39 I. A 1 919
Mitchell *v.* Foster, 12 Ad. & E. 472; 9 L. J. (N. S.) M. C. 95 ... 959
Mobile Ry. Co. *v.* Burnhill, 91 Tenn. 399; 30 Am. St. Rep. 889 116
Modhoosoodun Dey *v.* Bissonauth Dey, 15 B. L. R. 361, referred to 59
Mohan Pandey *v.* Lala Bhagwati Charan, Ind. Cas. 813 ... 1007
Mohendra Nath Sepai *v.* Parbutty Charan Dass, 8 C. W. N. 136 279
Moher Sheikh *v.* Queen-Empress, I. L. R. 21 Calc. 392, referred to 349
Mohesh Chandra Bhuttacharjee *v.* Biswa Nath Bhuttacharjee, I. L. R. 25 Calc. 250 593
Mohesh Chandra Saha *v.* Emperor, 12 C. W. N. 416, followed ... 781
Mohesh Lal *v.* Bawan Das, I. L. R. 9 Calc. 961; L. R. 10 I. A. 62 540
Mohesh Narain Munshi *v.* Taruk Nath Moitra, I. L. R. 20 Calc. 487; L. R. 20 I. A. 30 508
Mohori Bibee *v.* Dharmo Das Ghose, I. L. R. 30 Calc. 539; L. R. 30 I. A. 114 235
Mohunt Burm Suroop Dass *v.* Khashee Jha, 20 W. R. 471 ... 891
Mohunt Padmalav Ramanuja Das *v.* Lukmi Rani, 12 C. W. N. 8 245
Moll Schutte & Co. *v.* Luchmi Chand, I. L. R. 25 Calc. 505, distinguished 568
Mondakini Dasi *v.* Adinath Dey, I. L. R. 18 Calc. 69 ... 585
Montagu, *In re*, [1897] 2 Ch. 8 42
Mooney *v.* Buford, 72 Fed. Rep. 32 116
Moonshee Hossein Alli *v.* Ashotosh Gangoolly, 3 C. L. R. 30 ... 105
Mott *v* Shoolbred, L. R. 20 Eq. 22 55
Moul Singh *v.* Mahabir Singh, 4 C. W. N. 242, distinguished ... 120
Monmohan Karmokar *v.* Dwarka Nath Karmokar, 12 C. L. J. 312 277
Mrinalini Dasi *v.* Abinash Chandra Dutt, 11 C. L. J. 533 ... 38
Mudaliar *v.* Srinivasa Pillai, I. L. R. 30 Mad. 426; L. R. 34 I. A. 186 544
Muhammad *v.* Umar Bibi, 28 Punj. Rec. 501 428

PAGE.

Muhammad Hussain *v.* Sultan Ali, 38 Punj. Rec. 207 ... 428
Muhammad Umarjan Khan *v.* Zinat Begam, I. L. R. 25 All. 385 225
Mulji Lala *v.* Lingu Makaji, I. L. R. 21 Bom. 201 792
Mungul Pershad Dichit *v.* Grija Kant Lahiri, I. L. R. 8 Calc. 51 ; L. R. 8 I. A. 123 ... ...270 ; 851
Munna Lal *v* Hajira Jan, I. L. R 33 All. 28 920
Munro *v.* Didcott, [1911] A. C. 140 292
Munro *v.* Ship "Baltic", 1 Martin O. S. (La) 194 317
Musaheb Zaman Khan *v.* Inayatullah, I. L. R. 14 All. 513 ... 543
Mussamut Amirrunnessa *v* Baboo Behary Lall, 25 W. R. 529 ... 1038
Mussummut Gulab Koer *v.* Badshah Bahadur, 10 C. L. J. 420 ... 273
Muthuswami Mudali *v.* Veeni Chetti, I. L. R. 30 Mad. 382 ... 779
Mutty Lall Ghose, *In the matter of*, I. L. R. 19 Calc. 192 ... 259
Muttakke *v.* Thimmappa, I. L. R. 15 Mad. 186 706

N

Nafar Chandra Kundu *v.* Ratnamala Debi, 13 C. L. J. 85 ; 15 C. W. N. 66 92
Namuna Bibi *v.* Rosha Miah, I. L. R. 38 Calc. 482 851
Nand Lal *v.* Hanuman Das, I. L. R. 26 All. 368, discussed ... 1016
Nanomi Babuasin *v.* Modhun Mohun, I. L. R. 13 Calc. 21 ; L. R. 13 I. A. 1 863
Narang Rai Agarwalla *v.* River Steam Navigation Company Ld., I. L. R. 34 Calc. 419 1031
Narasayya *v.* Sami, I. L. R. 12 Mad 43, relied on 53
Narayan *v.* Venkatacharya, I. L. R. 28 Bom. 408 864
Narayana Sami Chetti *v.* Samidass Mudali, I. L. R. 6 Mad. 293 ... 864
Narayan Govind *v.* Visaji, I. L. R. 23 Bom. 494, referred to ... 1050
Narayan Venku *v.* Sakharam Nagu, I. L. R. 11 Bom. 519 ... 641
Natasayyan *v.* Ponnusami, I. L. R. 16 Mad. 99 863
National Fire Insurance Co. *v.* Chambers, 32 Atl. 663 ; 53 N. J. Eq. 468 116
Nether Stowey Vicarage, *In re*, L. R. 17 Eq. 156 36
Neufelder *v.* German Insurance Co., 6 Wash. 336 ; 36 Am. St. Rep. 166 116
Nga Tha Yah *v.* Burn, 11 W. R. F. B. 8 ; 2 B. L. R. F. B. 91 ... 301
Nilmamud Sarkar *v.* Boul Das, 14 C. W. N. 73, distinguished ... 1016
Nilmani Singh Deo *v.* Bakra Nath Singh, I. L. R. 9 Calc. 187 699 ; 1011
Nilmani Singh Deo *v.* Taranath Mukerjee, I. L. R. 9 Calc. 295 ... 243
Nirad Mohini Dassi *v.* Shibadas Pal Dewasin, I. L. R. 36 Calc. 975 229
Nityahari Roy *v.* Dunne, I. L. R. 18 Calc. 652, approved ... 53
Nobin Chandra Dey *v.* The Secretary of State for India, I. L. R. 1 Calc. 11 638
Noor Ali Chowdhry *v.* Koni Meah, I. L. R. 13 Calc. 13, followed 925
Nund Kumar Shaha *v.* Shurnomoyi, I. L. R. 15 Calc. 162, followed 789
Nundo Pershad Thakur *v.* Gopal Thakur, I. L. R. 10 Calc. 1008 918
Nunhoo Shahee *v.* Ram Pershad Singh, 21 W. R. 38, followed ... 353
Nur Muhamed *v.* Ibrahim, 8 Bom. H. C. (O. C.) 29 117
Nusseeram *v.* Gauree Sunkur Singh, 22 W. R. 192, distinguished 995

PAGE.

Nusseerooddeen Khan *v.* Indur Narain Chowdhry, B. L. R. Sup. Vol. 367 ; 5 W. R. 93 273
Nye *v.* Liscomb, 21 Pickering 263 115

O

Oak Pits Colliery Co., *In re*, 21 Ch. D. 322 ; 51 L. J. Ch. 768 ... 815
Oakey *v.* Russel, 6 Martin N. S. (La) 58 316
Obai Gounden *v.* Ramalinga Ayyar, I. L. R. 22 Mad. 217 ... 290
Ornelas *v.* Reyz, 161 U. S. 502 203
Oteiza *v.* Jacobus, 136 U. S. 330 203

P

P. and O. Steam Navigation Company *v.* The Secretary of State for India, 5 Bom H. C. 1 639
Padajirav *v.* Ramrav, I. L R. 13 Bom. 160 584
Pannu *v.* Sathappa, 1 L. B. R. 310 118
Papa Sastrial *v.* Anuntarama, I. L. R. 3 Mad. 98 626
Paramesh Raya *v.* Sesha Giriappa, I. L. R. 22 Mad. 364 ... 274
Parbati Charan *v.* Panchanand, I. L. R. 6 All. 243 105
Parbati Charan Roy *v.* Gobinda Chandra Kundu, 4 C. L. J. 246 ... 543
Pareman Dass *v.* Bhattu Mahton, I. L. R. 24 Calc. 672 ... 864
Parker *v.* First Avenue Hotal Company, L. R. 24 Ch. D. 282 ... 74
Partha Saradi Ayyangar *v.* Chinna Krishna Ayyangar, I. L. R. 5 Mad. 304 850
Partington, *In re*, [1902] 1 Ch. 711 42
Pasupati Nath Bose *v.* Nando Lal Bose, 5 C. W. N. 67, followed ... 560
Patch *v.* Ward, L. R. 3 Ch. App. 203 594
Patringa Koer *v.* Madhava Nand Ram, 16 C. W. N. 332 ... 851
Pearcy *v.* Player, 10 Rettie 564 ; 20 S. L R 376 316
Peari Lal Singh *v.* Chandi Charan Singh, 5 C. L. J. 80 ; 11 C. W. N. 163 880
Pearks, Gunston & Tee *v.* Ward, [1902] 2 K. B. 1 684
Peary Lal Singh *v.* Chandi Charan Singh, 11 C. W. N. 163 ; 5 C. L. J. 80 863
Peary Mohun Ghosaul *v.* Harran Chunder Gangooly, I. L. R. 11 Calc. 261 746
Peavey *v.* Wolfborough, 37 N. H. 286 45
Peck *v.* Peck, 21 L. T. R. 670, referred to 246
Peek *v.* North Staffordshire Railway Company, 10 H. L. 473 ... 760
Pegge *v.* Neath Tramways Co. Ld., [1898] 1 Ch. 183, followed ... 811
Pennington, *Ex parte*, 48 L. J. 808 ; 17 T. L. R. 614 ... 43
Pereira *v.* Pereira, [1901] A. C. 354 256
Pettibone *v.* Nichols, 203 U. S. 192 203
Phoodee Bibee *v.* Gobind Chunder Roy, 22 W. R. 272, referred to 606
Plimmer *v.* The Mayor, Councillors, & Co. of Wellington, L. R. 9 App. Cas. 699 444
Pohkar Singh *v.* Gopal Singh, I. L. R. 14 All. 361, referred to ... 341
Ponnu Sami Mudaliar *v.* Srinivasa Naickan, I. L. R. 31 Mad. 333 546
Porter *v.* Chicago Railway Company, 20 Iowa 73 317
Portuguese Copper Mines, Limited, *In re*, L. R. 45 Ch. D. 16 ... 919
Powell *v.* Powel , [1900] 1 Ch. 243, followed 933
Prannath Ray Chowdhry *v.* Rookea Begum, 7 Moo. I. A. 323 ... 830

PAGE.

Prayag Sahu *v.* Kasi Sahu, 11 C. L. J. 599 ; 14 C. W. N. 659 ... 863
Prem Chand *v.* Mokhoda, I. L. R. 17 Calc. 699 109
President of Brooklyn *v.* Patchen, 8 Wendell 47 217
Preston Banking Co. *v.* Allsup, [1894] 1 Ch. D. 141 ... 274
Prosunno Kumari Debya *v.* Golab Chand Baboo, 14 B. L. R. 450 ; L. R. 2 I. A. 145 890
Prosunno Kumar Sanyal *v.* Kali Das Sanyal, I. L. R. 19 Calc. 683 ; L. R. 19 I. A. 166 ... ...301 ; 690
Punchanun Bundopadhya *v.* Rabia Bibi, I. L. R. 17 Calc. 711, distinguished 299
Puran Chand *v.* Roy Radha Kishen, I. L. R. 19 Calc 132 ... 222
Purna Chandra Sarbajna *v.* Rasik Chandra Chakrabarti, 13 C. L. J. 119 51
Pydigantam Jagannadha Row *v.* Rama Doss Patnaik, I. L. R. 28 Mad. 197 890

Q

Queen *v.* Amir Khan, 9 B. L. R. 36 197
Queen *v.* Ganz, 9 Q. B. D. 93 212
Queen *v.* Gopal Doss, I. L. R. 3 Mad. 271, referred to ... 349
Queen *v.* Mohesh Chandra Roy, 24 W R. Cr. 67 156
Queen-Empress *v.* Abdool Rahiman, I. L. R. 14 Bom. 227, dissented from 487
Queen-Empress *v.* Barton, I. L. R. 16 Calc. 238 489
Queen-Empress *v.* Govind, I. L. R. 16 Bom. 283 970
Queen-Empress *v.* Gunning, I. L. R. 21 Calc. 782 489
Queen-Empress *v.* Kanji, I. L. R. 17 Bom. 184 970
Queen-Empress *v.* Narottam Das, I. L. R. 13 Bom. 681 ... 970
Queen-Empress *v.* Parashram Yeshvant, I. L. R. 20 Bom. 193, followed 377
Queen-Empress *v.* Radhi, I. L. R. 12 All. 66, not followed ... 782
Queen-Empress *v.* Subbaraya Pillai, I. L. R. 18 Mad. 487 ... 465
Queensland Land and Coal Co. *In re* [1894] 3 Ch. 181. followed 811

R

R *v* Maurer, 10 Q. B. D. 513 166
R *v.* Meunier [1894], 2 Q. B. 415 179
R *v.* Weil, 9 Q. B. D. 701 ; 15 Cox C.C. 189, followed ... 165
R *v.* Zossenheim, 20 T. L. R. 121 ... ...178 ; 218
Radhabai *v.* Anantrav Bhagvant Deshpande, I. L. R. 9 Bom. 198 890
Radhabullav Roy *v.* Benode Behari Chatterjee, I. L. R. 30 Calc. 449 119
Radha Nath Chowdhry, *In the matter of*, 7 C. L. R. 289 ... 836
Radha Nath Singh *v.* Chandi Charan Singh, I. L. R. 30 Calc. 660, referred to : 341
Radha Prasad Singh *v.* Lal Sahab Rai, I. L. R. 13 All. 53 ; L. R. 17 I. A. 150 225
Raghubar Dayal *v.* Budhu Lal, I. L. R. 8 All. 95, distinguished ... 829
Rai Churn Ghose *v.* Kumud Mohon Dutt, I. C. W. N. 687 ... 850

PAGE.

Rai Mohan Saha *v.* Sashanka Mohan Ray, 12 C. L. J. 407 ... 368
Rai Mohun Bose *v.* East Indian Railway Co., 10 B. L. R. 241 ... 746
Raja *v.* Janki Bai, 5 Bom. L. R. 570 118
Raja Har Narain Singh *v.* Chandhrain Bhagwant Kuar, I. L. R. 13 All. 300 825
Rajah Katagiri Venkata Subbamma Roy *v.* Rajah Vellanki Venkatrama Rao, I. L. R. 24 Mad. 1. ; L. R. 27 I. A. 197 ... 275
Raja Rup Singh *v.* Rani Baisni, I. L. R. 7 All. 1 ; L. R. 11 I. A. 149 730
Rajkeshwar Deo *v.* Bunshidhur Marwari, I ; L. R. 23 Calc. 873 1011
Rajmohun Bose *v.* East Indian Railway Co., 10 B. L. R. 241, distinguished 740
Rajrup Koer *v.* Abul Hossein, I. L. R. 6 Calc. 394 76
Raju Gramany *v.* Ammani Ammal, I. L. R. 29 Mad. 358 ... 337
Rakhambai *v.* Radhabai, 5 Bom. H. C. (App.) 181 584
Ramaiengar *v.* The Secretary of State, 20 Mad. L. J. 89 ; 6 Mad. L. T. 308 870
Ramanathan *v.* Levvai Marakayar, I. L. R. 23 Mad. 195 ... 300
Ramani Debi *v.* Kumud Bandhu Mukerjee, 12 C. L. J. 185 ... 273
Ramappa Hebbara, *In re*, 1 Weir, 550 465
Ramchandra Pandurang Naik *v.* Madav Purushottam Naik, I. L. R. 16 Bom. 23, referred to 341
Ram Chunder Singh *v.* Madho Kumari, I. L. R. 12 Calc. 484 ... 1014
Ramdhin Bania *v.* Sewbalak Singh, I. L. R. 37 Calc. 714 ; 14 C. W. N. 806 776
Ramesh Chandra Dhar, *v.* Karunamoyi Dutt, I. L. R. 33 Calc. 498 825
Ram Kirpal *v.* Rup Kuari, I. L. R. 6 All. 269 852
Ram Kirpal Shukul *v.* Rup Kuari, I. L. R. 6 All. 269 ; L. R. 11 I. A. 37 270
Ram Krishna Mahapatra *v.* Mohunt Padma Charan Deb Goswami, 6 C. W. N. 663 300
Ram Lal *v.* Kanai Lal, I. L. R. 12 Calc. 663 94
Ram Lall Thakoorseydas *v.* Soojun Mull Dhanumull, 4 Moo. I. A. 339 977
Ram Lochan Singh *v.* Beni Prasad Kumri, I. L. R. 36 Calc. 252 243
Ram Nundun Singh *v.* Janki Koer, I. L. R. 29 Calc. 828 ; L. R. 29 I. A. 178 729
Ram Pertab *v.* Madho Rai, 7 C. W. N. 216 117
Ram Prasad Malla, *In re.*, I. L. R. 37 Calc. 13 465
Ram Proshad Malla *v.* Raghubar Malla, 13 C. W. N. 1038 ... 776
Ram Sarup *v.* Bela, I. L. R. 6 All. 313 ; L. R. 11 I. A. 44 ... 632
Ramsden *v.* Dyson, E. & I. App. 129 444
Rango Jairam *v.* Balkrishna Vithal, I. L. R. 12 Bom. 44 ... 105
Rani Lekrai Kuar *v.* Baboo Mahpal Singh, L. R. 7 I. A. 63 ... 180
Rash Behary Lal Mandal, *v.* Emperor, I. L. R. 35 Calc. 1076 ... 959
Rateshwar Singh *v.* Gulab Chand. 6 Ind. Cas. 582 ... 864
Ray *v.* Underwood, 3 Pickering 302 115
Rector of Grimoldby, *Ex parte*, L. R. 2 Ch. D. 225 ... 36
Rector of Newton Health, *Ex parte*, 44 W. R. 645 36
Rector of St. Botolph, *Ex parte*, [1894]3 Ch. D. 544 ... 36
Reg. *v.* Ashton, 1 El. & Bl. 286, referred to 968
Reg. *v.* Hicklin, L. R. 3 Q. B. 360, followed 377

PAGE.

Reg. *v.* Lopez, Dears & B. 525 206
Reg. *v.* Lovett, 9 C. & P. 462 ... ...522 ; 608
Reg. *v.* Nidamurti Nagabhushanam, 7 Mad. H. C. 119 ... 855
Reg. *v.* Walton, 10 Cana. Cr. Cas. 269 206
Rex *v.* Crewe, [1910] 2 K. B. 576 201
Ridgway *v.* Ridgway, 29 W. R. (Eng) 612 395
Roop Lall Dass *v.* Bekani Meah, I. L. R. 15 Calc. 437 ... 300
Rose Ammal *v.* Rajarathnam, I. L. R. 23 Mad. 33, relied on ... 828
Royal British Bank *v.* Turquand, 6, El. & Bl. 327, followed ... 810
Ruckmaboye *v.* Lulloobhoy Motti Chund, 5 Moo. I. A. 234 ... 40
Rudolf Stallmann *v.* Emperor, I. L. R. 38 Calc. 547, distinguished 164
Russell *v.* Russell, [1897] A. C. 395 398
Russell *v.* Smyth, 9 M. & W. 810 ; 60 R. R. 904 ... 49
Rustomjee *v.* The Queen, 46 L. J. Q. B. 238 636

S

Sadhu Lall *v.* Ram Churn Pasi, I. L. R. 30 Calc. 394 ... 775
St. Alphege, *Ex parte*, 55 L. T. 314 47
St. Botolph, *Ex parte*, [1894] 3 Ch. 544 42
Saint Nazaire Co., *In re*, 12 Ch. D. 88 274
Saliq Ram *v.* Ramji Lal, I. L. R. 28 All. 154 776
Samar Dasadh *v.* Juggul Kishore Singh, I. L. R. 23 Calc. 366, distinguished 995
Saminadha Mudali *v.* The South Indian Railway Company, I. L. R. 6 Mad. 420 1031
Sanderson *v.* Graves, L. R. 10 Ex. 234 291
Santhalva *v.* Manjauna Shetty, I. L. R. 34 Mad. 1, dissented from 304
Sarabjit Partap Bahadur Sahi *v.* Indarjit Partap Bahadur Sahi, I. L. R. 27 All. 203 729
Sarat Chandra Sinha *v.* Nritya Gopal Biswas, 13 C. L. J. 284 293
Sarkum Abu Torab Abdul Waheb *v.* Rahaman Buksh, I. L. R. 24 Calc. 83 891
Saroda Prosad Singh *v.* Emperor, 7 C. W. N. 142 ... 153
Sartuk Chunder Dey *v.* Bhugut Bharut Chunder Singh (1853), S. D. A. 900 1011
Satcowri Ghosh Mondal *v.* Secretary of State, I. L. R. 22 Calc. 252 57
Saturjit Pertap Bahadoor Sahi *v.* Dulhin Gulab Koer, I. L. R. 24 Calc 469 825
Satyesh Chunder Sircar *v.* Dhunpul Singh, I. L. R. 24 Calc. 20 ... 290
Sayad Khan *v.* Davies, I. L. R. 28 Bom. 198 107
Scott, *Ex parte*, 9 B. & C. 446 206
Seagram *v.* Tuck, L. R. 18 Ch. D. 296 592
Secretary of State for India *v.* Kamachee Boye Sahaba, 7 Moo. I.A. 476 626
Secretary of State for India *v.* Mathurabhai, I. L. R. 14 Bom. 213, approved 53
Secretary of State for India *v.* Nitye Singh, I. L. R. 21 Calc. 38... 306
Seshaiyangar *v.* Raghunatha Row, 5 Mad. H. C. 345 957
Sewdutt Roy Maskara *v.* Nahapiet, I. L. R. 34 Calc. 628 ... 804

PAGE.

Shah Wajid Hossain *v.* Nankoo Singh, 25 W. R. 311 ... 863
Shama Churn Kundu *v.* Khettromoni Dassi, I. L. R. 27 Calc. 521 ; L. R. 27 I. A. 10 245
Shaw *v.* Stenton, 2 H. & N. 858 744
Sheazle, *In re*, 1 W. & M. 66 ; 21 Fed. Cas. 12734 201
Shenton *v.* Smith, [1895] A. C. 229 ; 64 L. J. C. P. 119 ... 644
Sheo Karan Singh *v.* Maharaja Parbhu Narain Singh, I. L. R. 31 All. 276, discussed 1016
Sheoraj Roy *v.* Chatter Roy, I. L. R. 32 Calc. 966 152
Sheorattan Rai *v.* Mohri, I. L. R. 21 All. 354, referred to ... 907
Sheo Singh *v.* Raghubans Kunwar, I. L. R. 27 All. 634, L. R. 32 I. A. 203 632
Sher Muhammad *v.* Jafir Khan, 18 Punj. Rec. 2 428
Shipwright *v.* Clements, 38 W. R. (Eng.) 746 275
Shivapa *v.* Shivapanch Lingapa, I. L. R. 11 Bom. 284 ... 274
Shrimant Sagajirao Khanderav Naik Nimbalkar *v.* Smith, I. L. R. 20 Bom. 736 706
Siletti, *In re*, 87 L. T. 332 ; 71 L. J. K. B. 935 164
Sinclair *v.* Broughton, I. L. R. 9 Calc. 341 ; L. R. 9 I. A. 152 ... 959
Singheeram Poddar *v.* Bhagbat Chander Nundi, 11 C. L. J. 545 ... 667
Sitaram *v.* Zalim Singh, I. L. R. 8 All. 231 877
Sitaramayya *v.* Venkataramanna, I. L. R. 11 Mad. 373 ... 864
Sitaram Pandit *v.* Harihar Pandit, 12 Bom. L. R. 910 ... 870
Siva Swami *v.* Soleman, 3 L. B. R. 255 118
Skinner *v.* Chicago Railway Company, 12 Iowa 191 317
Skyring *v.* Greenwood, 4 B. & C. 281 594
Smith, *In re*, 40 Ch. D. 386 47
Smith *v.* Andrews, [1891] 2 Ch. 678 55
Sonatun Dass *v.* Gooroo Churn Dewan, 21 W. R. Cr. 88, referred to 120
Southern Railway Company *v.* Ashford, 126 Alabama 591 ; 28 South. 732 317
Southwell *v.* Scotter, 49 L. J. R. (Q. B.) 356 294
Spokes *v.* Banbury Board of Health, L. R. 1 Eq. 42 74
Sprigg *v.* Sigean, [1897] A. C. 238 201
Spurstowe's Charity, *In re*, L. R. 18 Eq. 279 47
Sreenath Ghose *v.* Roma Nath Santra, 3 C. W. N. 276 ... 690
Sreenath Roy *v.* Cally Doss Ghose, I. L. R. 5 Calc. 82 ... 744
Sri Gopal *v.* Pirthi Singh, I. L. R. 24 All. 429 ; L. R. 29 I. A. 118 539
Srinath Das *v.* Probodh Chunder Das, 11 C. L. J. 580 ... 100
Sriram Chakravarti *v.* Hari Narain Singh, I. L. R. 33 Calc. 54 ... 628
Steele *v.* Brannan, L. R. 7 C. P. 261, followed 377
Sternaman *v.* Peck, 80 Fed. Rep. 883 214
Stevens *v.* Fuller, 136 U. S. 478 211
Stewart *v.* North British Railway Company, 5 Rettie 426 ... 315
Stewart *v.* Rhodes, [1900] 1 Ch. 386 276
Stock's Estate, *In re*, 42 L. T. 46 43
Subramanian Chettiar *v.* Aruna Chalam Chettiar, I. L. R. 25 Mad. 603 ; L. R. 29 I. A. 138 290
Suffer Ali Khan *v.* Golam Hyder Khan, 6 W. R. Cr. 60, referred to 344
Sumer Singh *v.* Liladhar, I. L. R. 33 All. 472 ; 8 Al. L. J. 306 ... 870

PAGE.

Sundaralingasami Kamaya Naik *v.* Ramasami Kamaya Naik, I. L. R. 22 Mad. 515 ; L. R. 26 I. A. 55 728
Sundar Singh *v.* Doru Shankar, I. L. R. 20 All. 78, referred to ... 473
Surajmal Marwari *v.* Kristo Pershad Singh, 10 C. W. N. cclx ... 1015
Surendra Narayan Adhicary *v.* Emperor, I. L. R. 39 Calc. 522 ... 608
Surendra Nath Banerjee *v.* Chief Justice of Bengal, I. L. R. 10 Calc. 109 ; L. R. 10 I. A. 171 173
Surendro Keshub Roy *v.* Doorga Soondery Dassee, I. L. R. 19 Calc. 513 584
Surjya Narain Singh, *In re*, 5 C. W. N. 110, referred to ... 885
Syad Abdul Hak *v.* Gulam Jilani, I. L. R. 20 Bom. 677 ... 830
Syed Ajam Sahib *v.* Madura Sree Meenatchi Sundareswarar Devastanam, 21 Mad. L. J. 202, approved 1016
Syed Mahomed Athor *v.* Sultan Khan, 4 C. W. N. 527 ... 308

T

Tamm *v.* Williams, 3 Doug. 281 ; 2 Chitty 438 115
Terlinden *v.* Ames, 184 U. S. 270 203
Thakur Das Manjhi *v.* Namdar Mundul, 24 W. R. Cr. 12, referred to 781
Thakur Pershad *v.* Sheikh Fakirullah, I. L. R. 17 All. 106 ; L. R. 22 I. A. 44 273
Thakur Prosad *v.* Punkal Singh, 8 C. L. J. 485 706
Thomas, *In re*, [1900] 1 Ch. 319 43
Thompson *v.* Thompson, 17 T. L. R. 572 399
Thorne *v.* Cann, [1895] A. C. 11 545
Tichborne *v.* Tichborne, L. R. 2 P. & D. 41 594
Tincouri Debya *v.* Shib Chandra Pal, I. L. R. 21 Calc. 639 ... 109
Tingley *v.* Bateman, 10 Mass. 343 115
Tirbhuwan Bahadur Singh *v.* Rameshar Bakhsh Singh, I. L. R. 28 All. 727 ; L. R. 33 I. A. 156, followed 419
Tirugnana Sambandha *v.* Nallatambi, I. L. R. 16 Mad. 486 ... 830
Tirumalayappa *v.* Veerabudra, 19 Mad. L. J. 759 864
Tollet *v.* Thomas, L. R. 6 Q. B. 514 970
Toona *v.* Kurreemun, 6 W. R. (Mis.) 31 274
Toulmin *v.* Steere, 3 Mer. 210 542
Trustees of Tid, *Ex parte*, 17 W. R. (Eng.) 758 47
Tugnell, *In re*, 27 Ch. D. 309 45
Tukarambhat *v.* Gangaram Mulchand Gujar, I. L. R. 23 Bom. 454, referred to 843
Turaf Sahib *v.* Esuf Sahib, I. L. R. 30 Mad. 322, discussed ... 1016
Tyrrell *v.* Painton, [1894] P. 151, discussed 245

U

Udit Upadhya *v.* Bhawani Din, I. L. R. 27 All. 84 795
Udoy Kumari Ghatwalin *v.* Hari Ram Shaha, I. L. R. 28 Calc. 483, referred to 1010
Uma Charan Das *v.* Muktakeshi Dasi, I. L. R. 28 Calc. 149, discussed 563
Umaid Bahadur *v.* Udoi Chand, I. L. R. 6 Calc. 119 ... 327
United States of America *v.* Gaynor, [1905] A. C. 128 ... 203

PAGE.

V

Vadju *v.* Vadju, I. L. R. 5 Bom. 22 830
Van Inthoudt, *Ex*, unreported 211
Van Vorst, *Ex parte*, 2 N. J. Eq. 292 45
Veerabhadra Varaprasada Row *v.* Velanki Venkatadri, 10 Mad. L. J. 114 890
Venkaji Babaji Naik *v.* Shidramapa Balapa Desai, I. L. R. 19 Bom. 663 292
Venour's Settled Estate, *In re*, 2 Ch. D. 526 36
Vicar of Queen's Camel, *In re*, 11 W. R. (Eng.) 503 41
Vine *v.* Raleigh, [1891] 2 Ch. 13 43
Viresa *v.* Tatayya, I. L. R. 8 Mad. 467, not followed 53
Voss *v.* Secretary of State for India, I. L. R. 33 Calc. 669 ... 644
Vulcan Iron Works *v.* Bishumbhur Prasad, I. L. R. 36 Calc. 233 117

W

Wadge, *In re*, 15 Fed. Rep. 864 218
Wajid Ali Khan *v.* Hanuman Prasad, 4 B. L. R. (A. C.) 139 ; 12 W. R. 484 919
Wajid Khan *v.* Ewaz Ali Khan, I. L. R. 18 Calc. 545 ... 937
Walji Mathuradas *v.* Ebji Umersey, I. L. R. 29 Bom. 285 ... 826
Walker, *Ex parte*, 1 Drew. 503 45
Walmesley *v.* Walmesley, 69 L. T. 152 399
Walsh *v.* Lonsdale, 21 Ch. D. 9, applied 664
Waring *v.* Waring, 2 Phillim. 132 398
Watt *v.* Watt, 3 Ves. 244 98
Whiteley and Roberts' Arbitration, *In re*, [1891] 1 Ch. 558 ... 1001
Williams *v.* Aylesbury Railway Co., L. R. 9 Ch. App. 684 ... 43
Wright *v.* Carter, [1903] 1 Ch. 27, followed 933
Wright *v.* Tatham, 5 Cl. & Fin. 670, followed 120
Wright *v.* Vanderplank, 2 K. & J. 1 444
Wyeth *v.* Lang, 127 Missouri 242 ; 48 Am. St. Rep. 626 ... 116

Y

Yule & Co *v.* Mahomed Hossain, I. L. R. 24 Calc. 124 ... 573

Z

Zinnatunnessa Khatun *v.* Girindra Nath Mukerjee, I. L. R. 30 Calc. 788 706

THE

INDIAN LAW REPORTS,

Calcutta Series.

PRIVY COUNCIL.

RAMESHWAR SINGH

v.

SECRETARY OF STATE FOR INDIA.

P.C.*
1911

June 15, 16, 19; July, 12.

[ON APPEAL FROM THE HIGH COURT AT FORT WILLIAM IN BENGAL.]

Settlement, construction of—Settlement of malikana or dasturat payable to zamindar in 1780—Allowance as compensation for portions of land taken by Government for the creation of jagirs—Liability of jagirdars—Resumption by Government, effect of—Suit for sum referred to as malikana in settlement and account of 1865—Long acquiescence in sum settled in 1780.

This was a suit in which the appellant, the Maharajah of Darbhanga, claimed to be paid an annual sum of Rs. 482 odd by the Government of India as *dasturat* or *malikana*, an allowance by way of compensation to the proprietors for the loss of their proprietary rights in portions of their land taken by the Government for the creation of jagirs (or revenue-free holdings) and which until resumption by Government was payable by the jagirdars, but for the payment of which on resuming them the Government themselves became liable. The claim was based upon an order of 10th May 1865, by which the appellant alleged that the annual *malikana* payable to him in respect of land called mouzah Sahu was permanently fixed at Rs. 482-0-3. The defence was that the *malikana* payable in respect of a jagir known as Meherullah Khan, of which mouzah Sahu formed part, was settled in 1780 at Rs. 796-2-9, and nothing further was recoverable ; and that the order made in 1865 did not give the right

* *Present:* LORD MACNAGHTEN, LORD SHAW, LORD MERSEY, and MR. AMEER ALI.

1911

RAMESHWAR SINGH v. SECRETARY OF STATE FOR INDIA.

claimed. The sum of Rs. 796-2-9 had admittedly been paid to the predecessors in title of the appellant since 1780, and was still being paid to the appellant himself, but he claimed to be paid the sum of Rs. 482 odd in addition. His contention was that the fixing of the *malikana* in 1780 was not a final ascertainment of the rights of his predecessors in title in respect of it, but was merely a temporary fixing of the percentage by which the amount should be ascertained from time to time, as it varied, together with the variation of the amount of the proceeds of the land. Both Courts in India held that the appellant was entitled to nothing more than the Rs. 796-2-9 already paid to him.

Held (affirming those decisions), that what was done in 1780 amounted to a final settlement of the owner's rights in respect of the *malikana*, the payment of which was to be made regularly every year from 1780, no term being fixed. That it was regarded as final by the parties concerned was clear from the fact that the payment was made thenceforward for a century without any suggestion that it was in any way wrong, or was subject to revision. The settlement of 1865 only dealt with the method of payment of the *malikana*. It provided neither for any alteration nor for any addition to the *malikana* already fixed in 1780. The account attached to the settlement was made for the purposes of the settlement only, and the reference in it to *malikana* was made merely because the *malikana* was an item to be taken into account in fixing the annual jumma to be paid by the person in whose favour the settlement was made in respect of the mouzahs comprised in the settlement. That this was the right view to take of the settlement of 1865, and the account annexed to it, was confirmed by the fact that no claim was ever made by the appellant for payment of the *malikana* until 1892, 27 years after the date of the permanent settlement, and that no such payment had ever been made to him.

APPEAL from a decree (5th February 1907) of the High Court at Calcutta, which affirmed a decree (17th December 1903) of the Additional Subordinate Judge of Mozufferpore.

The plaintiff was the appellant to His Majesty in Council.

The question for determination in this appeal is whether the appellant (Sir Rameshwar Singh Bahadur, K.C.I.E., the Maharajah of Darbhanga) is entitled to receive from the Government of India an annual

sum of Rs. 482-0-3 as an allowance by way of *dasturat* or *malikana* in respect of certain land, known as mouzah Sahu, situated in pargana Ahilwara in the District of Tirhut.

The appellant's case was that he and his ancestors had been for many generations the proprietors of large estates in the District of Tirhut. During the reign of the Mahomedan Emperors a number of villages belonging to the estates of the Darbhanga Raj were assigned by Imperial *farman* as rent-free estates to various persons, including one Meherullah Khan. Such estates were known as jagirs and their holders as jagirdars. Meherullah Khan's jagir was known by his name as Jagir (or mehal) Meherullah Khan. In paragraph 5 of the appellant's case it was stated that "in cases where such jagirs were created, it was usual to give the zemindar, out of whose estate they were carved, an allowance by way of compensation for the loss of his rights in the land. This allowance was known as *dasturat* or *malikana* and was payable by the jagirdar to the zemindar."

In 1780 a question arose as to the amount of *dasturat* payable to the Darbhanga Raj by the various jagirdars whose tenures had been created out of the Raj estate, and the East India Company, in its capacity of Dewan of Behar, issued, on 24th February 1780, a *parwana* fixing the total sum receivable by the Raj as *dasturat* at Rs. 22,321-13-3; the proportion payable in respect of mehal Meherullah Khan being fixed at Rs. 796-2-9, this being a percentage on the net profits for the year 1185 F. The particulars of the items making up this latter sum were set out in a further *parwana* of the same date.

This *dasturat* was paid by the jagirdars to the Darbhanga Raj until the various holdings were subsequently from time to time resumed by the

1911

RAMESHWAR SINGH v. SECRETARY OF STATE FOR INDIA.

Government. It was not disputed that, from the dates of the respective resumptions, the *dasturat* became payable by the Government, and that the sum of Rs. 796-2-3 has in fact been regularly paid by them to the appellant and his predecessors in title.

Forming part of mehal Meherullah Khan were eight mouzahs in pargana Ahilwara. These mouzahs were known as Sahu, Parwar (two mouzahs), Baswanti (three mouzahs), Sehri, and Manikpur. When these mouzahs were being settled after resumption, it was found that they were so closely connected as to be practically one mouzah, known as Sahu, and they were measured and settled as one mouzah under the made of Sahu; and where in this suit mouzah Sahu is referred to, it is those eight mouzahs which are meant. These mouzahs were resumed by Government by an order of 10th January 1840, and appear to have been the last of the mouzahs of mehal Meherullah Khan to be resumed. Various temporary settlements of these mouzahs were effected, the first on 30th September 1841, the second on 10th February 1845, the third on 19th July 1845; and the permanent settlement was finally effect on 10th May 1865. The nature of the various settlements is summarised at the beginning of the proceedings recording the permanent settlement. At the time of the permanent settlement of 1865 the then Maharajah had acquired by purchase two-thirds of the jagirdari rights. In the 11th paragraph of the appellant's case it was stated that, "in each of these settlements the *malikana* on account of these mouzahs was fixed as follows:—In the first at Rs. 446-8-2, in the second at Rs. 225-12-11, in the third at Rs. 466-9-8, and in the last at Rs. 489-0-3. The point in dispute in this appeal is whether this sum is payable to the appellant in addition to the Rs. 796-2-3 already referred to."

It is admitted that in 1857, 1858 and 1859 the Government paid to the then Maharajah various sums on account of the *malikana* for Sahu, amounting to Rs. 6,236-0-8, which would be payments for about 14 years at the rates set out in the last preceding paragraph hereof. These payments were in addition to the annual sum of Rs. 796-2-3 fixed by the *parwana* of 1780. From the year 1859 no payments in respect of this *malikana* were made to or claimed by the Raj till the year 1892. The appellant accounted for this by the fact that for a great part of that time the estate was under the Court of Wards, which omitted to draw the *malikana* and failed to inform the late Maharajah, when making over the estate to him, that he was entitled to such payment. It was not until the end of 1891 that the then Maharajah discovered that he was so entitled.

On becoming aware of his right to this *malikana*, the then Maharajah in 1892 applied to the Collector of Darbhanga for payment of the arrears due to him, but his application was, on 17th May 1893, rejected by the Collector, whose order was upheld by the Commissioner of the Patna Division on 29th November 1895. He then appealed to the Board of Revenue, and on 16th April 1899 Mr. C. C. Stevens, a Member of the Board, set aside the orders of the Collector and the Commissioner, and directed that *malikana* should be paid at the rate fixed by the permanent settlement of 1865 with arrears from the date of the settlement.

On 26th August 1898 the Board of Revenue, acting without jurisdiction, set aside the order of Mr. Stevens, and on 24th April 1900 made a further order restoring the earlier orders and rejecting the Maharajah's claim.

The appellant thereupon, on 6th February 1902, instituted the suit out of which the present appeal

1911

RAMESHWAR SINGH v. SECRETARY OF STATE FOR INDIA.

arose, and in his plaint, after setting out the facts, prayed for a declaration that the respondent was bound to pay him and his successors in perpetuity the sum of Rs. 482-0-3 in accordance with the terms of the permanent settlement, and arrears from the date of the settlement. The *malikana* fixed by the permanent settlement was in fact Rs. 489-0-3. No reason is given for the claim in the plaint being only Rs. 482-0-3.

The respondent in his written statement submitted (*inter alia*) that the condition as to *malikana* in the permanent settlement was contrary to the provisions of Regulation VII of 1822, and therefore *ultra vires* of the officers who carried out the settlement, and of no legal force; that the said condition was inserted in the settlement owing to mistake and misapprehension of the existing facts, and was not enforceable in equity, and that as the appellant was receiving from Government Rs. 796-2-9 which was the entire sum due as *malikana* in respect of the whole jagir Meherullah Khan, of which mouzah Sahu formed part, he was not entitled to additional *malikana* in respect of mouzah Sahu. He further contended that the payments made in 1857, 1858 and 1859 were made by mistake and inadvertence, and could not be relied upon as evidence of the recognition by Government of any obligation to pay the amount claimed, and he relied on the fact that in the year 1844, after the resumption of mouzah Sahu, the appellant's predecessors in title had made a claim on Government for *malikana* in respect of certain resumed jagirs, including jagir Meherullah Khan, of which mouzah Sahu formed part, and that he had claimed in respect of the whole jagir the sum of Rs. 796-2-9 and no more, and that he was entitled to no further sum from the Government.

The following paragraphs of the respondent's case are set out as more clearly elucidating his defence to the suit :—

"6. The Honourable East India Company became Dewan of Bengal, Behar and Orissa in the year 1765. On 24th February 1780, two *parwanas* were issued under the authority of the Company as Dewan, directing the payment to the servants of Raja Madho Singh (one of the appellant's predecessors in title who was then the proprietor of Sarkar Tirhut) of certain sums as *dasturat malikana*. One of these *parwanas* was addressed generally to the *amla* (or collecting staff) of the owners of jagirs in Sarkar Tirhut and directed the payment of various sums as *dasturat malikana* in respect of the several jagirs there specified. These sums amounted to a total of Rs. 22,361-12-9. Jagir (or mehal) Meherullah Khan is among the jagirs there specified, and the sum of Rs. 796-2-9 is directed to be paid as *dasturat malikana* in respect thereof. The second of the said *parwanas* is addressed specifically to the *amla* of jagir (or mehal) Meherullah Khan and directs them to pay the said sum of Rs. 796-2-9 as *dasturat malikana*; details are given showing how that sum is calculated. The said annual sum of Rs. 796-2-9 has admittedly been paid to the appellant's respective predecessors in title since the date of the said *parwanas*. Until the resumption (next to be described) of jagir Meherullah Khan, such annual sum was so paid by successive holders of the jagir; and since the resumption it has been so paid by the Company and by the respondent. No question arises as to the liability of the respondent to pay the said annual sum of Rs. 796-2-9 to the plaintiff.

"7. A decree for the resumption of that part of jagir Meherullah Khan which included mouzah Sahu

1911

RAMESHWAR SINGH v. SECRETARY OF STATE FOR INDIA.

and for the assessment of revenue thereon, was passed in favour of the Company on 10th January 1840 by the Special Deputy Collector of the District of Tirhut acting under Regulation II of 1819 and Regulation III of 1828. Decrees for the resumption of other parts of the said jaigir were passed at various times between 1836 and 1840.

"11. A permanent settlement of mouzah Sahu and other mouzahs was made in 1865 in accordance with a proceeding (or *rubokar*) bearing dates 10th May 1865, 15th June 1865, and 16th July 1865. This permanent settlement was made as to two-thirds with Maharajah Lachmeshwar Singh Bahadur (then a minor under the Court of Wards), the successor in title of Maharajah Maheshwar Singh Bahadur aforesaid; and as to one-third with Ramdulari Kumar and another. The said settlement was made with the said persons because they, as being the possessors (in the properties aforesaid) of the interest of the original possessors of jagir Meherullah Khan, were entitled to such settlement if willing to accept it upon reasonable terms as to payment of revenue to Government.

"12. The proceedings for the permanent settlement in 1865 provide for the payment to Government by the holders of the settlement of a fixed sum of Rs. 489-0-3 towards the *malikana* due under the said *parwana* of 1780; but the appellant, as the successor in title of Maharajah Lachmeshwar Singh Bahadur, claims to receive this sum (subject to an arithmetical correction) from the respondent as an annual payment in addition to the annual sum of Rs. 796-2-9 hereinbefore referred to, together with arrears of the said additional sum. The appellant had no claim to any annual payment in addition to the said sum of Rs 796-2-9, and the settlement proceedings of 1865 could not confer any such title upon him.

"13. In the year 1844 the appellant's predecessor in title for the time being, the proprietor of Sarkar Tirhut, applied to the Collector of Tirhut for the *dasturat* and *malikana* due to him from Government on account of the resumption of certain jagirs in that district. The amounts claimed by the appellant's predecessor in title on that occasion included a sum of Rs. 796-2-15 g. as *malikana* in respect of jagir Meherullah Khan. And an office report upon the said application shows that mouzah Sahu was one of the mouzahs in respect of which the said sum was claimed. No further *malikana* was claimed in respect of the said jagir. The said application was submitted by the Collector to the Commissioner of the Bhagalpur Division for sanction in a letter dated 15th August 1844, and sanction was accorded by the Commissioner in a letter dated 3rd May 1845.

"14. In the year 1853 the appellant's predecessor in title, Maharajah Maheshwar Singh Bahadur, was called upon, under the order of the Commissioner of the Bhagalpur Division, to state particulars of all jagirs in which he claimed proprietary right, which had been resumed, and on account of which he was or was not in receipt of *dasturat malikana*. The said Maharajah Bahadur accordingly presented a petition dated 21st September 1853. The schedule to the said petition contains a statement that a *malikana* of Rs. 796-2-15 g. has been paid in respect of 'Mehal Khairullah Khan,' and the context shows that the word 'Khairullah' is a misprint for 'Meherullah.' The schedule further contains a statement of jagirs or mehals in respect of which the payment of *dasturat malikana* by the Government was claimed, and this part of the schedule contains no mention of mouzah Sahu."

The Subordinate Judge on the issues raised held that the plaintiff had no valid cause of action; that

1911

RAMESHWAR SINGH v. SECRETARY OF STATE FOR INDIA.

the question of limitation therefore did not arise; that the plaintiff was not entitled to receive the sum of Rs. 482-0-3 (or Rs. 489 odd as stated by the Subordinate Judge) over and above the sum of Rs. 796-2-15gds., which he had been receiving annually; that mouzah Sahu was admittedly one of the several mouzahs contained in jagir Meherullah Khan, and that the sum of Rs. 796-2-15 gds. included the *malikana* in respect of mouzah Sahu; that the settlement *rubokar* was not a covenant made by the Government in favour of the appellant's predecessor in title as expropriated proprietor of mehal Sahu, but was a contract between the Government and the plaintiff's predecessor in title, and certain other persons with whom the settlement was made as owners of the jagiri right in the mehal; that the persons with whom the settlement was made were not entitled to any *malikana* under clause 2 of section 5 of Regulation VII of 1822; that the conditions referred to were for payment by the holders of the Permanent Settlement of a sum of Rs. 489 odd to enable the Government to pay the ancient *malikana* due to the plaintiff's predecessor in title as such expropriated proprietor, and was not made in contravention of the provisions of Regulation VII of 1822, nor under mistake, misapprehension or inadvertence; and that the payments made in 1857, 1858 and 1859 were made under mistake and misapprehension, and did not amount to any recognition of the plaintiff's right to receive the additional amount claimed.

On these findings the Subordinate Judge dismissed the suit.

The plaintiff appealed to the High Court and the appeal came before BODILLY and SARADA CHARAN MITRA, JJ. who, after hearing it, were of opinion that certain additional evidence should be produced with

reference to the assessment of *malikana* in respect of certain other mouzahs comprised in jagir Meherullah Khan, and intimated that they would receive and consider any further evidence that the parties could produce. Accordingly, the defendant filed a petition on 17th March 1906 and filed certain settlement and resumption records relating to the above matters.

The appeal again came on for hearing before SARADA CHARAN MITRA and CASPERSZ, JJ., who, after reviewing the various settlement proceedings, upheld the findings of the Subordinate Judge, and dismissed the appeal. The material portion of their judgment was as follows :—

"So far as we can make out, the quinquennial settlements made since 1780 and the Decennial and Permanent Settlements of 1790 and 1793, respectively, did not include the jagir villages in the settlements with the Durbhanga Raj. The settlements were made exclusive of these villages, the Raj being only entitled, under the order of the 24th February 1780 to which we have referred, to *dasturat* and *malikana* as specified in the *parwanas* of that date. Thus, though originally forming parts of Sarkar Tirhut, they ceased to be so at the Permanent Settlement of 1793, and all the rights of the Raj in respect of them, except *dasturat* and *malikana*, were practically extinguished. . . . . ."

After referring to the resumptions by Government of some of the jagir villages, the judgment continued :—

"According to the papers of 1844 the amount payable to the Raj for the five villages in pargana Ahilwara was Rs. 703-10. Accepting the contention raised on behalf of the Government, we observe that this sum ought to have been apportioned on the five different villages at their settlements, but it is obvious that the Government officers omitted to do so, except as regards Sahu. No reason has been given to us for such omission. The conflicting decisions of the Revenue authorities on the claim of the Raj are on the record. They differ from each other on material points : they give valuable information bearing on the questions raised before us, but they do not touch the vital matter—the reason for the omission to apportion and assess the *dasturat* and *malikana* dues on the several villages

1911

RAMESHWAR SINGH v. SECRETARY OF STATE FOR INDIA.

resumed and permanently settled previous to the permanent settlement of Sahu with the plaintiff's predecessor and his co-sharers.

"The villages in pargana Narson included in jagir Meherullah Khan were resumed on the 4th December 1839, but it is not necessary for us to go through the history of these or the other villages in jagir Meherullah Khan, as it appears that in the permanent settlement of none of them was any notice taken of the present claim of the Darbhanga Raj to *dasturat* and *malikana*. Each village had to pay its proportionate share, but there was no imposition under this head. *Malikana* was added to revenue whenever the ex-jagirdars or persons claiming through them were found not to be in possession. That the jagir-holders originally had to pay a certain sum each for making up in all Rs. 796-2-9 for jagir Meherullah Khan is clearly established by the documentary evidence on the record. That upon the resumption of the jagir, the liability shifted on to the Government, and that the Government admitted their liability is also clearly established, but it does not appear that the Government took the necessary precaution to impose on the permanently settled holders the liability by fixing definite amounts as payable by them over and above the Government revenue and the *malikana* to the ex-jagirdars or their legal representatives as provided in section 3 of Regulation II of 1819. Sahu and Harnagar are probably exceptions. It would seem, therefore, that in most of the permanent settlements the officers of Government either legally or unwittingly omitted to fix any sums in the shape of *dasturat* and *malikana* payable to the Raj. Thus the Government had to take upon itself the burden of paying Rs. 796-2-9 for jagir Meherullah Khan, and Government, according to the contention of the learned Advocate-General, must be regarded as a loser except in so far as the amounts are recoverable from Harnagar and Sahu.

"The exact origin and nature of the charges, *dasturat* and *malikana* or *dasturat malikana*, are matters involved in obscurity. These charges have not been defined in the Revenue Regulations.

"The term *malikana* is derived from *malik*, the Arabic word for 'owner' or 'proprietor,' and it means an allowance for proprietary rights given by Government to proprietors who declined to engage for the *jummas* proposed to them under the Regulations of 1793 and whose lands were, in consequence, let in farm or held *khas* by Government. The rule on the subject is now to be found in section 5, Regulation VII of 1822. But it appears from Mr. McNeile's Memorandum on the Revenue Administration of the Lower Provinces (1873) that 'in the Behar districts the payment of *malikana* dates from a period long anterior to that of the Permanent Settlement.' Mr. Shore, in his Minute of the 18th September 1789, stated that he had in vain endeavoured to trace the origin of the system, but he

supposed it 'to have arisen from the custom established in that province of dividing the produce between the cultivator and Government, in order to afford the proprietor of the soil a proportion of the produce, which, under such an usage strictly enforced, he could never receive without some authorized allowance in his favour' (paragraph 6). In other words, those 'proprietors' who were in receipt of *malikana* in Mr. Shore's time had been already shelved with hereditary pensions amounting to a certain percentage on the rental of their estates, rental and revenue being then synonymous. Mr. McNeile goes on to say that the Permanent Settlement put an end to this system, 'except in those cases where the proprietors declined the terms offered them, and preferred to remain out of possession. Such proprietors continued, as in other parts of Bengal, to receive *malikana* allowances under the rule above quoted.'

"Mr. McNeile also says:—'But there were besides extensive lands in Behar, the Government share of the rental of which had been alienated by royal and other grants. The proprietors of these lakheraj estates were assessed to the public revenue, the lakherajdars remaining in possession, the *malikana* previously due from them was added to the Government revenue with which they were assessed and has since been paid to the maliks from the Treasury by the Collector' (page 99). These observations may be equally applied to the facts of the present case. For it will appear from the *parwanas* of the year 1780, to which reference has already been made, that the English Company, the Dewan of the Emperor Shah Alam, continued the payment of certain allowances styled *dasturat nankar* and *malikana*, to Raja Madho Singh, the predecessor of the present plaintiff, on account of the lakheraj Mehal Meherallah Khan; these allowances, as we have stated, amounted to Rs. 796-2-9, and they were unaltered until the mehals were resumed. In Mr. Shore's minute of the 18th of September 1789 (paragraph 147) reference is made to a proposition of the Collector of Tirhut for the resumption of the grant of *dasturat* to the Raja and for making him a permanent allowance in compensation for the resumption. The *dasturat* is there stated to comprehend a variety of articles of which an enumeration is given from an account for 1187F. It includes *malikana*, and this paragraph in Mr. Shore's minute may explain the entries in the *parwana* of 1780. We think, however, Mr. Shore referred to other *dasturats* and not the *dasturat* referred to in the present suit, though it is of the same nature.

"Thus the history and nature of those imposts, so far as they may be ascertained from the papers on the record of this case, and the authorities on the subject, lead us to the conclusion that they were originally payable by the holders of the villages to the proprietors of the parent estate from which they had been carved out; that on the resumption, the Government

1911

RAMESHWAR SINGH v. SECRETARY OF STATE FOR INDIA.

occupied the same position as that of the original holders of those villages or their representatives when and so long as they were in possession (and as a matter of fact the Government admit such liability), and that after the Government parted with possession by making permanent settlements, the liability naturally passed to the settlement-holders. The sum payable for jaigir Meherullah Khan has remained unaltered since 1780, and it appears to us that it is fixed and unalterable, and each settlement-holder is bound to pay his share of the original sum as a liability which has passed to him from the jagirdar and the Government in succession. If the ex-jagirdar is also the settlement-holder, there can be no question that he should bear the burden, and a rateable part of the allowance to the proprietor of the original parent estate should be added to the revenue payable, the Government having undertaken to pay the entire allowance. If, on the other hand, the settlement-holder is some other person, not the ex-jagirdar, the rateable share of the allowance ought still to come out of the villages and be paid either out of the *malikana* payable under section 3 of Regulation II of 1819 and section 5 of Regulation VII of 1822, or be added as an additional sum payable by the settlement-holder over and above the revenue and *malikana*. We do not deem it necessary now to consider from whom the sum should be realised in the event of a settlement-holder being different from the ex-jagirdar. If, however, the lands by any process of transfer or merger came into the possession of the proprietor himself, the allowance or a rateable share of it would come to an end, and the Government on re-settlement after resumption would be entitled to be relieved of their liability *pro tanto*.

"In the present case, Sahu came to be in the possession of the plaintiff, the proprietor, to the extent of a two-thirds share, and Dulari Kumar or Kishan Ballabh Mahto had the remaining one-third as representatives of the ex-jagirdar, and so far as the two-thirds share of the rateable amount payable for Sahu is concerned, the plaintiff could not claim it from Government. If, notwithstanding the settlement, the Government kept on their entire liability and continued to pay the entire sum of Rs. 796-2-9, the plaintiff was bound to re-imburse the Government to the extent of his share of the liability.

"The plaintiff's predecessor acquired a two-thirds share of the jagir village Sahu in 1853 and the Permanent Settlement was concluded by the proceeding of the 10th May 1865. The revenue fixed was Rs. 2,892-2-1, out of which Rs. 482-0-3 was payable as *malikana*. This *malikana*, according to the proceeding and the correspondence that took place between the Collector and the higher Revenue authorities, was payable to the plaintiff's predecessor himself, but the proceeding is ambiguous as to whether it was payable as a part of the original *dasturat* and *malikana* allowance or as an

independent item. All that clearly appears is that it was payable to the plaintiff's predecessor as proprietor of Sarkar Tirhut. He was not entitled to it or a two-thirds share of it as ex-jagirdar, because the settlement was made with him and his co-sharer as the jagirdars in possession. But the question necessarily arises, why should the sum of Rs. 482-0-3 be payable in addition to the sum of Rs. 796-2-9. The Maharajah had no right to it under the fiscal laws in force. He could get it only as a part of the original allowance.

"The confusion giving rise to the present litigation is, it seems to us, attributable to an incorrect use of the term *malikana* after the resumption of jagir mehal Meherullah Khan, as also to the fact that a species of *malikana* was one of the items aggregating Rs. 796-2-9, being the consolidated sum which was paid from the year 1780 to Raja Madho Singh and his successors in the Raj Durbhanga. It is sufficiently obvious that the charge ceases when the property on which it is charged is no longer excluded from the control of the person to whom an allowance was granted by way of compensation for his deprivation of that property. This, it seems to us, was the result of the settlement of the year 1865 of mouzah Sahu made with the Raj. The settlement of Sahu to the extent of a two-thirds share was made in prepetuity with the proprietors of the lands in conformity with section 6, Regulation XXXVII of 1793—the Badshahi Grants Regulation—and no *malikana* allowance was permissible with reference to the provisions of Regulation VII of 1822, section 5, because the jagir was neither let in farm nor held *khas;* the proprietor was not 'expropriated' as the expression is.

"Assuming, however, that *malikana* was properly allowed in the settlement of 1865, we think that the amount of *dasturat*, *nankar*, &c., as the items appear in the proceedings and *pamranas* of 1780 previously payable to the proprietor, should have been expressly deducted from the amount of *malikana* granted. This was not done, but the consolidated sum of Rs. 796-2-9 continued to be *malikana*, and the sum of Rs. 482-0-3 was allocated either on a correct calculation or not to Sahu. But the real difficulty in this case has arisen not merely from the ambiguous language of the proceeding of the 10th May 1865, but from the procedure adopted by the Revenue Officers in calculating the amount payable to the proprietor, the plaintiff's predecessor. In the view we have taken, the proper sum to be added as *malikana* to the actual amount of revenue or Government demand as such was only a proportionate amount of the sum of Rs. 796-2-9 and not ten per cent. of the nett assets. The latter calculation is applicable to the case of ordinary *malikana* payable under the Regulations and calculated according to section 5 of Regulation VII of 1822, but when the case rests on a grant of pensionary allowance like the one before us, the calculation must

1911

RAMESHWAR SINGH v. SECRETARY OF STATE FOR INDIA.

be based on a different principle, such as we have indicated above. In the different settlements of the different villages at one time constituting jagir Meherullah Khan, this principle was lost sight of and the consequence has been undoubted loss to Government and it may be loss to the plaintiff as well.

"This appeal was allowed to stand over after its first hearing in order that the parties might have a further opportunity of adducing evidence on the question of the exact amount apportionable on Sahu as *dasturat* and *malikana*, so that if possible the rights and liabilities of the parties might be finally adjusted. The Secretary of State for India in Council has filed certain documents which we have used as evidence. The plaintiff has filed none. We do not, however, find in the record, even with the additions made to it in this Court, sufficient materials for ascertaining the precise amount payable for Sahu, though there can be no doubt as to the liability of the plaintiff to pay to the Government a proportionate share of the sum which the Government pays as *dasturat* and *malikana* according to the proceeding of the Council of Azimabad of 24th February 1780. The permanent settlement (of 1865) of Sahu may not be altered, but relief could be given to the plaintiff in other ways if the exact amount could be ascertained.

"It is, however, clear that the plaintiff cannot get the sum of Rs. 482-0-3 as *malikana* in addition to the sum of Rs. 796-2-9 payable as *dasturat* and *malikana*. It would be most inequitable to direct that the Raj should receive both the sums, and this, in fact, is the relief sought for in the suit."

On this appeal,

DeGruyther, *K.C.*, and *E. U. Eddis*, for the appellant, contended that the Courts in India should have held that the appellant was entitled to the *malikana* fixed by the permanent settlement of 1865, by which, it was submitted, the respondent was bound, and had no power to go behind it, or to deal with it either by revision, alteration, or setting it aside; that there was nothing ambiguous in the settlement proceedings, nor anything to show that the *malikana* fixed thereby was regarded as a portion of the *dasturat* fixed in 1780; that until the contrary was proved the settlement of 1865 must be held to be regular and correct, and binding on the parties thereto;

that the onus being on the Government to show, if such is the case, that it is erroneous they have failed to discharge that onus; that the High Court was in error in its findings as to the right of the appellant to receive *malikana* at the time of the permanent settlement, and if, as the High Court suggests, the appellant would be bound to reimburse to the Government the proportion of the Rs. 796-2-9 apportionable on Sahu, the onus was on the Government to show what that amount was, and they had failed to do so; and that the order made in the appellant's favour by Mr. Stevens as Member of the Board of Revenue, dated 16th April 1897, was binding on the Government, and should not have been set aside. Reference was made to Harington's Analysis of Bengal Laws and Regulations, Ed. 1817, Calcutta, Vol. III, pages 242, 243, 244, 344, 405, 410, 411, 415; the 5th Report on the East India Company's affairs by Select Committee of the House of Commons (letter of Mr. John Shore of 18th September 1789, page 85, paragraphs 3 and 7), pages 557, 568, paragraph 147, and page 583; Baden Powell on Land Tenures in India ("malikana"), page 16; Sarada Charan Mitra's Land Law of Bengal (Ed. 1898), pages 64, 125 and 126 as to "malikana;" Law relating to Land Tenures in Lower Bengal, by A. Phillips (Ed. 1876); Field's Regulations of the Bengal Code, (Ed. 1875); Regulation XXXVII of 1793, page 261; Regulation II of 1819, page 470; Regulation VII of 1822, section 5, clause 2, page 528; Regulative IX of 1825, section 5, clause 5, page 580. The amount fixed by the settlement in 1865 was either a mistake of the Revenue office, or it was fixed in perpetuity. In 1780 there was no power or authority to make a settlement; in 1865 there was authority under Regulation XXXVII of 1793.

Sir Erle Richards, K.C., and *E. M. Konstam*, for the respondent, contended that the appellant was not

1911

RAMESHWAR SINGH v. SECRETARY OF STATE FOR INDIA.

entitled to any payment in the nature of *dasturat* or *malikana* in respect of mouzah Sahu, other than what was included in that respect in the annual sum of Rs. 796-2-9 which was admittedly due to him; that the *parwanas* dated 24th February 1780, the letters of the 15th August 1844 and 3rd May 1845, read with the office report dated 4th April 1844 and the petition of the appellant's predecessor in title dated 21st September 1853, showed that the annual sum of Rs. 796-2-9 was the whole of the annual payment to which the appellant was entitled in respect of jagir Meherullah Khan, in which jagir mouzah Sahu was included (see paragraphs 6, 13 and 14 of respondent's case); that the proceedings for the permanent settlement of mouzah Sahu in 1865 did not set up any contract between the Government and the appellant or his predecessors in title as expropriated proprietors of mouzah Sahu (see paragraph 12 of respondent's case); that mouzah Sahu having been resumed in 1840 under the provisions of Regulation II of 1819, was settled direct with the proprietors in 1865 under the provisions of Regulation VII of 1822, as applied by Regulations III of 1828 and IX of 1825, and therefore no *malikana* was payable to the proprietor; that by virtue of section 5 of Regulation VII of 1822, clause 2, *malikana* was only payable to the proprietor when land was let in farm or held *khas*, and neither of these conditions was fulfilled in the case of mouzah Sahu; and that the sum mentioned as *malikana* in the permanent settlement proceedings of 1865 was not thereby made payable by the Government to the appellant or his predecessors in title, but was merely mentioned as an allocation to mouzah Sahu of a part of the said annual sum of Rs. 796-2-9. There was no distinction between *dasturat* and *malikana* which were substantially the same things. Reference was made to

Harington's Analysis of Bengal Laws and Regulations, Vol. III, page 345, the question and answer as to zamindars being ousted ; *malikana* was compensation for the loss of profits the zamindar sustained : Sarada Mitra's Land Law of Bengal, page 56 ; jagir lands were not included in the settlement of 1793. The *parwana* of 24th February 1780 settled the *malikana* for ever ; there was no agreement to pay 10 per cent. on any profits as the appellant states. If the appellant ever had any claim it was barred by the law of limitation.

DeGruyther, K.C., in reply. The title of the predecessor from whom the appellant derived the right he claimed began as an owner of land and a jagirdar put in by the Government in 1780, and entitled to 10 per cent. on the profits as *malikana*. Had that right ever been lost ? There was nothing anywhere that took away the right to receive that : see Field's Bengal Regulations " Introduction," page 69.

The judgment of their Lordships was delivered by

July 12.

LORD MERSEY. This is an appeal from a decree of the High Court of Judicature at Fort William in Bengal, dated the 5th February 1907, confirming a decree of the Subordinate Judge of Mozufferpore, dated the 17th December 1903.

The action was commenced on the 6th February 1902, and it was brought to establish a claim on the part of the appellant to be paid an annual sum of Rs. 482-0-3 by the Government of India by way of *dasturat* or *malikana* in respect of certain land known as mouzah Sahu in the Tirhut District.

The claim is based upon an order of the Court of the Assistant Collector of Tirhut, dated the 10th May 1865, by which the appellant alleges that the annual

1911

RAMESHWAR SINGH v. SECRETARY OF STATE FOR INDIA.

dasturat or *malikana* payable to him in respect of mouzah Sahu was permanently fixed at Rs. 482-0-3.

The answer to the claim is that the *dasturat* or *malikana* payable in respect of a mehal or jagir known as Meherullah Khan was settled once for all as long ago as 1780 at Rs. 796-2-9, and that as the mouzah Sahu formed part of that mehal or jagir nothing further is recoverable, and further, that the order relied on does not give the right claimed. It is common ground that the Rs. 796-2-9 has been regularly paid year by year to the appellant or his predecessors in title since 1780, and that it is being paid at the present time.

It appears that one of the appellant's predecessors in title was the proprietor of a large estate in the district of Sarkar Tirhut. About the middle of the 18th century the then Emperor Alamgir carved out of this estate several jagirs or revenue-free holdings. One of these jagirs was granted to a certain Meherullah Khan and was known by his name. It included the village known as mouzah Sahu. The effect of the creation of these jagirs was to diminish the owner's income from his land, and thereupon, according to custom, the owner became entitled to receive an annual payment from the jagirdars (the grantees of the jagirs) calculated on the proceeds derived by them from the cultivation of their jagirs. This payment is described in the appellant's case (paragraph 5) as an allowance by way of compensation for the loss of the proprietor's rights in the land, and is said to be known as "*dasturat* or *malikana*." After the creation of these jagirs, namely, in 1765, the East India Company became Dewan of Bengal, and the question having arisen as to the amount of the *dasturat* or *malikana* to be paid by the jagirdars, the Company, in its capacity as Dewan, after enquiry,

issued a *parwana* or order dated the 24th February 1780, fixing the total amount at Rs. 22,321-12-3. By another *parwana* of even date, the proportion of this sum of Rs. 22,321-12-3 payable in respect of jagir Meherullah Khan was ascertained at Rs. 796-2-9. It is important to observe the wording of these two *parwanas*. The first is addressed to the amlas (collecting staffs) of the whole of the jagirs. It recites a previous *parwana* of the 21st October 1779, which had fixed the *dasturat* at Rs. 23,339-6-3 "according to the actual proceeds for 1185 F.S." (corresponding with our year 1778) of the said jagirs. It then states that a dispute had arisen about one item, that that item had accordingly been deducted, and that the balance Rs. 22,321-12-3 had been "fixed as the amount of *dasturat* according to the details given on the back." It then proceeds as follows:—"You will, according to the above, continue to pay the *dasturat*, &c., to the Amla of the Raja *regularly every year from the y ar 1186 F.S.*" (1779). On the back the amount to be paid in respect of each jagir is set out, that for Meherullah Khan appearing as Rs. 796-2-9. The second *parwana* is addressed to the amlas of jagir Meherullah Khan, and after stating that the *dasturat* has been "ordered and fixed" on the actual gross proceeds of 1185 F.S. (1778), requires the amlas to pay the same "as per detail on the back to the amlas of the Raja regularly every year from the year 1186 F.S. (1779)." On the back the items making up the *dasturat* are set out. When added together they amount to Rs. 796-2-9. Among these items is one described as "mal (*i.e.*, *malikana*) at 10 per cent., Rs. 184-4-6." It is contended on behalf of the appellant that the fixing of the *dasturat* or *malikana* by these two *parwanas* was not a final ascertainment of the rights of the appellant's predecessor in respect of *dasturat* or *malikana*, but was

1911

RAMESHWAR SINGH v. SECRETARY OF STATE FOR INDIA.

merely a temporary fixing of the percentage by which the amount should be ascertained from time to time; and that as the proceeds of the land varied, so the amount of the *dasturat* or *malikana* would vary. This view was not accepted by either of the Courts below, nor is it in their Lordships' opinion the right view. The wording of the *parwanas* points to a fixing of an amount and not of a mere percentage. No doubt the amount is arrived at on the basis of the proceeds for the year 1778, but it is the sum of money so arrived at (Rs. 796-2-9), which is to be paid year by year in the future: not a varying sum dependent on the proceeds of the land. No term is fixed; the payment is to be made regularly every year from 1779 onwards. This appears to constitute a final settlement of the owners' rights in respect of *dasturat* or *malikana*; and that it was so regarded by the parties concerned seems clear from the fact that the payment was made thenceforward for a century without any suggestion that it was in any way wrong or was subject to revision.

It is said, however, that subsequent events show that the appellant's contention is right. The jagirs which had been created by the Emperor Alamgir were in course of time resumed by the Government of India. The last of them to be resumed was the jagir of Meherullah Khan. It was resumed in parts at different dates between 1836 and 1840, the last part to be resumed being that which comprised mouzah Sahu. This part was resumed on the 10th January 1840. The effect of the resumption was to transfer the obligation to pay the *dasturat* or *malikana* from the jagirdars to the Government, and to vest in the Government the right to the revenues. Accordingly, from 1840 the Government has paid the whole of the Rs. 796. But it is said by the appellant that the Government has not only paid the Rs. 796, but has

also paid other additional sums on account of *malikana* for Sahu, thus admitting the right of the appellant to receive more than the Rs. 796. That such payments were in fact made is not contested. They were made between the years 1857 and 1859, and amounted in all to Rs. 6,000 or Rs. 7,000. The respondent contends that these payments were made by mistake. The appellant adduced no evidence to show the nature of the claim put forward for these additional payments nor the circumstances under which the payments were made; and at the very time that they were being made, the Rs. 796 payable by virtue of the *parwana* of 1780 was also being paid. The payments were made on the orders of the then Assistant Collector of Tirhut, who is described by Mr. Stevens (a member of the Board of Revenue) in his order of the 16th April 1897, set out at page 92 of the Record, as "an officer of very short experience." The Judge of the first Court below found as a fact that these payments had been made under mistake and misapprehension and their Lordships see no reason for differing from this finding. The payments, therefore, become of no significance in relation to the present litigation.

It is further said that a permanent settlement of mouzah Sahu together with other mouzahs was made on the 10th May 1865, and that in such settlement the *dasturat* or *malikana* was fixed at Rs. 489-0-3, and the point now in dispute, as stated by the appellant in paragraph 11 of his case, is whether this sum is payable to the appellant in addition to the Rs. 796-2-9.

The settlement in question will be found set out at page 68 of the Record. It begins by reciting a number of previous temporary settlements, the last of which appears to have been for 20 years from May 1845, at an annual *jumma* of Rs. 2,617-7-9, inclusive of

1911

RAMESHWAR SINGH v. SECRETARY OF STATE FOR INDIA.

malikana. This settlement would expire in May 1865. It then proceeds, in Parts V and VI, to deal with the question of *malikana*. It states that the whole of the *malikana* is payable to the Maharajah Lachmeshwar Singh Bahadur, one of the appellant's predecessors in title, and in addition it finds that, since the last preceding settlement, two-thirds of the jagirdar's rights had been acquired by the said Maharajah, and that he is in possession of them. The Maharajah thus held a double position. He was the owner entitled to receive the *malikana*, and also the proprietor of two-thirds of the jagirdar's rights which involved the liability to contribute to the payment of the *malikana*. The settlement deals with this position. Part VI is as follows :—

"Inasmuch as Maharajah Lachmeshwar Singh Bahadur, who was before entitled to *malikana* only, is now a possessor also, reference was made to the Collector . . . as to whether *malikana* allowance should be made separate or not; in answer thereto a letter . . . . . was received containing instructions to the following effect :—'*malikana* right cannot be extinguished, but there should be new arrangement and new rule so as to avoid the roundabout way of payment of the *malikana* by the possessor, and of the subsequent withdrawal of it from the treasury. But that cannot be done in the case of this mehal, because Maharajah Lachmeshwar Singh, minor, is possessor of two-thirds, and Kishan Ballabh Mahta is possessor of one-third . . . therefore arrangement is made according to former practice.'"

This is the only reference in the settlement itself to *malikana*, and it is obvious that it refers exclusively to the method of payment. It neither provides for any alteration of, nor for any addition to, the *malikana* already fixed in 1780. There is, however, an account attached to the settlement in which the gross proceeds of the "main mehal" are stated to be Rs. 5,355. From this, Rs. 535, being 10 per cent., is deducted for *malikana*, and the balance is divided one-half to the possessor and the other half to the Government. In an outer column the *malikana*

(Rs. 535), less 10 per cent. for village expenses, is added to the sum payable in respect of the main mehal, and after taking into account certain other items, the result is brought down as follows:—

	Rs.	A.	P.
Mal	2,461	11	4
Malikana	489	0	3
Expenses repairing road ...	27	7	0

The item 489-0-3 is an error. It ought to be Rs. 482-0-3 (Rs. 535, less 10 per cent.). The error is corrected in Part VII, which fixes for the settlement a uniform annual *jumma* of Rs. 2,943, inclusive of *malikana*, from the 1st May 1865 in perpetuity. This sum is arrived at by adding to the Rs. 2,461-11-4 above mentioned the correct amount, namely, Rs. 482, for the *malikana*. It is suggested by the appellant that this account read in conjunction with the settlement, of which it is part, gives to the appellant a right to claim as *malikana*, apart from and in addition to the *malikana* accorded to him in 1780, the further sum of Rs. 482. Their Lordships are of opinion that the account, whether taken alone or whether read with the clauses of the settlement, can bear no such interpretation. It is an account made up for the purposes of the settlement only, and the references in it to *malikana* are made merely because the *malikana* is an item to be taken into account in fixing the annual *jumma* to be paid by the persons in whose favour the settlement is made in respect of the mouzahs which are comprised in the settlement. That this is the right view to take of the settlement and of the account annexed to it is, in their Lordships' opinion, confirmed by the fact that no claim was ever made by the appellant for payment of this *malikana* until 1892, 27 years after the date of the permanent settlement, and that no such payment has ever been made to him.

1911

RAMESHWAR SINGH v. SECRETARY OF STATE FOR INDIA.

Their Lordships are of opinion that the appeal fails, and they will humbly advise His Majesty accordingly. The appellant must pay the costs.

Appeal dismissed.

Solicitors for the appellant: *Sanderson, Adkin, Lee & Eddis.*

Solicitor for the respondent: *The Solicitor, India Office.*

J. V. W.

PRIVY COUNCIL.

*P.C.**
1911

June 19; July 27.

RANG LAL SINGH
v.
RAVANESHWAR PERSHAD SINGH.

[ON APPEAL FROM THE HIGH COURT AT FORT WILLIAM IN BENGAL.]

Sale in execution of decree—Setting aside sale—Material irregularity, allegation of—Civil Procedure Code (Act XIV of 1882), ss. 287, 291—Proclamation of sale—Sale fixed to take place "at monthly sales," naming day, place and hour of commencement of such sales—Absence of presiding officer.

A sale in execution of a decree was adjourned from 16th May until 13th July, and in the fresh proclamation of sale issued it was notified that "in the absence of any order of postponement the sale would be held at the monthly sales commencing at 6 o'clock on the morning of 13th July 1903 at Monghyr." Owing to the absence of the presiding officer from the station, the monthly sales did not begin until 17th July, and in the course of them the sale in question was held on the 20th. On an application under section 311 of the Civil Procedure Code (Act XIV of 1882) to set aside the sale on the ground of "material irregularity" within the meaning of sections 287 and 291 of the Code:—

Held (affirming the decision of the Courts in India), that in holding the sale on 20th July the Court had not acted in contravention of the provisions

* *Present*: LORD MACNAGHTEN, LORD SHAW, LORD MERSEY, and MR. AMEER ALI.

of the Code, and there had been no "material irregularity" in publishing or conducting the sale.

APPEAL from a judgment and decree (24th September 1905) of the High Court at Calcutta, which affirmed an order (11th May 1904) of the Subordinate Judge of Monghyr, in the matter of an application to set aside a sale made in execution of a decree.

The judgment-debtors were the appellants to His Majesty in Council.

The application was made by petition under section 311 of the Code of Civil Procedure (Act XIV of 1882) to have the sale of the one-fourth share of the appellants in mouzah Dumri, in execution of a mortgage-decree obtained against them by the respondents, set aside. The only grounds necessary to refer to on this appeal were that there had been material irregularities in publishing and conducting the sale, which had the effect of causing substantial injury to the appellants.

The first respondent (the purchaser at the sale), who alone opposed the application, denied that there was any irregularity in the matter of the sale, and asserted that an adequate price had been obtained for the property sold.

The irregularities complained of were *(a)* non-publication of the sale proclamation, *(b)* non-publication of a fresh proclamation under section 291 of the Civil Procedure Code, 1882, the sale not having taken place within seven days from the date fixed for the sale, *(c)* that the Government revenue payable being more than Rs. 500, the sale should have been published in the *Calcutta Gazette*, and *(d)* that when the property in dispute was purchased in the name of Balmakund Sahay, Dewan of the Maharaja of Gidhour (the respondent), the latter cannot be declared to be the purchaser of the property.

1911

RANG LAL SINGH v. RAVANESHWAR PERSHAD SINGH.

As to these objections the Subordinate Judge found as follows :—

"(*a*) In regard to the publication of the sale proclamation, I find it is established by the evidence of the Court peon Nasiruddin, identifier Nunu Lal, who accompanied the peon, chowkidar Toran Pasban and patwari Shyam Lal, that the sale proclamation was published in all the villages of the disputed taluk, and that it was finally stuck up on a *bur* tree near the zamindari katchari at Dumri.

"(*b*) In regard to this, I find 13th July 1903 was fixed for sale in the sale proclamation. From the 13th to 16th July, the Court did not sit, as the presiding officer went on casual leave. On the 17th July Mr. Floyd, who had an interest in the disputed property and who had been repeatedly taking adjournments, applied again to postpone the sale; his application was rejected and the sale commenced on the next day, the 18th July. It was not concluded that day, as it was represented to the Court that more bidders would be coming on the next opening day, and so the sale continued to the 20th July, on which day the property was knocked down for Rs. 38,000, the 19th July being Sunday. I see no irregularity in the procedure thus adopted in conducting the sale.

"(*c*) The revenue payable for the 16-annas taluk Dumri is Rs. 55-1-3; so the revenue payable for the disputed 4-anna share being less than Rs. 500, no publication was required to be made in the *Calcutta Gazette*.

"(*d*) The property was knocked down in the name of Balmukund Sahay, Dewan of the Maharaja of Gidhour. The Dewan says he purchased for the Maharaja, and both the Dewan and the Maharaja are on the record. I see no irregularity in this."

As to the question whether the property had been sold at an inadequate price and whether any substantial injury had resulted to the judgment-debtor, the Subordinate Judge said :—

"Regarding the objection of under-valuation, I find the gross collection of the property, from the *jummabundi* (Ex. I) filed by the judgment-debtor in the Road-cess office, to be Rs. 2,488-13-4. Added to it, the income derivable from Mr. Floyd, Rs. 266, the total collection amounts to Rs. 2,754-13-4. Deducting from it the Government revenue payable for the property and collection charges amounting to Rs. 700, the balance Rs. 2,054-13-4 would be the nett income of the property, which was sold for Rs. 38,000, *i.e.*, at nearly 19 years' purchase. But the villages of this taluk were generally sold at only 14 or 15 years' purchase. The disputed property therefore fetched a very good price at the sale; it was not sold at an inadequate price Mr. Floyd is a 2nd mortgagee of the disputed property.

He tried first to pay off the decree debt. Failing therein, he attempted to secure bidders and raised the value of the property at the sale with a view to recover the money advanced by him on the property. At his request sale proclamations were published six times on the property, and it was under the 6th publication that the property in dispute was sold. When on the 30th March 1903, on the representation of Mr. Floyd, 11th May 1903 was the date fixed for the sale under the 5th proclamation, Mr. Floyd could not appear on the latter day, the judgment-debtor (himself) appeared and applied for three days' adjournment, and at his instance the sale was adjourned to 14th May, and the property having fetched only Rs. 12,100 at the sale, it was postponed to 13th July, under a fresh proclamation. Every possible care was taken to sell the property at a fair price, which I think was sold for a very adequate value of Rs. 38,000. Under the circumstances, I must reject the judgment-debtor's petition."

An appeal to the High Court was heard by HARINGTON and PARGITER, JJ., who dismissed it with costs. They said:—

"The point taken on behalf of the appellants is that the sale should have taken place on the 13th July 1903, but that the Judge being away on casual leave the sale did not take place until the 18th July, that there was no warrant for holding the sale on the 18th and that therefore the whole proceeding was illegal and void.

"It is further contended that the notices required to be served were only served in one out of the 13th mouzahs. Even if it be assumed that these matters were established, there was in our opinion only an irregularity. The onus therefore rests upon the appellants to show that they have suffered substantial loss in consequence of these irregularities, supposing in fact irregularities took place.

"Now, the property was sold and it fetched Rs. 38,000. The Judge finds that the net collection from the property amounted to Rs. 2,054 odd. If that finding is correct, then, so far from the judgment-debtors having suffered any injury, they succeeded in selling their property at a good price, at 19 years' purchase, which is more than the average price of property in that district. But the appellants contend that the collections amounted to Rs. 5,200 or 5,300. Oral evidence was given to this effect and the appellants state that the *jammabandi* shewing these figures is in possession of their manager. It is a very remarkable fact that they did not produce the *jummabandis* which they say are in their manager's possession. From the Road-cess returns which were filed by the judgment-debtors, we see that the collections amounted to something over Rs. 2,000. That being so, we think the Judge was quite right in his conclusion, and the appellants have entirely failed to show that the property has been sold at

1911

RANG LAL SINGH v. RAVANESHWAR PERSHAD SINGH.

an inadequate price. Even if there was an irregularity in the proceedings, the appellants have sustained no damage, consequently they are not entitled to have the sale set aside."

On this appeal,

Sir Erle Richards, K.C., and *A. M. Dunne*, for the appellants, contended that the representation in the sale proclamation as to the value of the property being only Rs. 11,541, the notices having been served in one mouzah only out of the thirteen, the sale having taken place more than seven days after the advertised date in contravention of the provisions of section 291 of the Civil Procedure Code (Act XIV of 1882), were all material irregularities which invalidated the sale. As to the date of sale, the day and hour of sale must be specified in the proclamation: see section 291 of the Code: yet the sale was advertised for one day, and took place on another, and the hour was not given. Reference was made to sections 286, 287, 291 and 311 of the Code of Civil Procedure; Woodroffe and Ameer Ali's Civil Procedure, page 949; and *Basharutulla* v. *Uma Churn Dutt* (1). There was no evidence whatever that 19 years' purchase constituted a proper or an adequate rate at which to assess the price of such a tenure. Road-cess returns were not a proper foundation for calculating the proper value of the property. The price obtained was inadequate, and substantial loss was caused to the appellant thereby, which results were both referable to the material irregularities in the conduct of the sale.

DeGruyther, K.C., and *Ross*, for the respondent, were not called upon.

July 27. The judgment of their Lordships was delivered by MR. AMEER ALI. This is an appeal from a judgment and decree of the High Court of Bengal which affirmed

(1) (1889) I. L. R. 16 Calc. 794.

the order of the Subordinate Judge of Monghyr, dismissing the application of the judgment-debtors, appellants, under section 311 of the Civil Procedure Code (Act XIV of 1882) to set aside a sale of certain landed property in execution of a mortgage-decree.

The grounds on which the sale was impugned in the first Court were twofold, (*i*) that the property sold was a *ghatwali* tenure and therefore inalienable; and (*ii*) that there was material irregularity in publishing and conducting the sale which resulted in substantial injury to the appellants.

The first ground appears to have been abandoned in the High Court and is not pressed before this Board. The appellants now rest their case mainly on the provisions of sections 287 and 291 of the Code. They urge that on the 16th of May 1903 the sale was postponed to the 13th of July following and a sale proclamation was directed to issue fixing that date for sale; that it was not sold on the 13th, but on a later date, without a fresh proclamation as required by law, and that consequently the sale is null and void, and ought to be set aside. An examination, however, of the proceedings culminating in the sale shows that there is no substance in the appellants' contention. It is clear from the order-sheet that sale proclamations had issued, at the instance of the appellants, not less than six times. On the 30th of March 1903 the sale was stayed on their application and a sale proclamation had issued fixing the 11th of May. On this day the appellants asked for three days' grace, which was granted, the property being "kept under hammer." It was not, however, put up to sale until the 16th of May, when it was found that there were not sufficient bidders present, and a fresh proclamation was therefore ordered to issue, fixing the 13th of July for the sale. In the proclamation it was notified that "in the

1911

RANG LAL SINGH v. RAVANESHWAR PERSHAD SINGH.

absence of any order of postponement the sale would be held at the monthly sale, commencing at 6 o'clock in the morning of the 13th of July 1903, at Monghyr."

The presiding officer was, however, absent from Monghyr from the 13th to the 16th of July. On the 17th an application was made to him for a postponement, which was rejected. The property, however, was not sold until the 20th. It is evident that on the 16th of May the sale was postponed to the 13th of July, the day on which the monthly sales were to commence; those sales did not actually begin until the 17th, owing to the absence from the station of the presiding officer, and the sale was held on the 20th in the course of the monthly sales. On the facts appearing on the record their Lordships think the Subordinate Judge did not act in contravention of the provisions of the Civil Procedure Code in holding the sale on the 20th of July.

Both the Courts in India have found against the appellants on the question of substantial injury. The evidence regarding the value of the property is meagre and unsatisfactory, and their Lordships are not satisfied that, assuming even there was any irregularity in publishing the sale, any substantial injury has been caused thereby to the appellants.

On the whole, their Lordships are of opinion that the order of the High Court is right, and that this appeal should be dismissed with costs. And they will humbly advise His Majesty accordingly.

Appeal dismissed.

Solicitors for the appellants: *T. L. Wilson & Co.*
Solicitors for the first respondent: *Downer & Johnson.*

J.V.W.

CIVIL RULE.

Before Mr. Justice Mookerjee and Mr. Justice Caspersz.

KAMINI DEBI

v.

PRAMATHA NATH MOOKERJEE.*

1911

April 10.

Land Acquisition—Debuttar—Shebait—Land Acquisition Act (I of 1894), s. 32, sub-s. (1), cls. (i) and (ii)—Compensation—Whether shebait is entitled to withdraw compensation money for necessary repairs of debuttar property—Jurisdiction—Practice.

Land dedicated to an idol or to religious and charitable purposes is land belonging to the shebait or trustee "who has no power to alienate the same" within the meaning of the provisions of section 32 of the Land Acquisition Act.

Where a portion of the debuttar property was acquired under the Land Acquisition Act, and the compensation money was invested in approved securities, the shebait is entitled to withdraw a portion of the invested funds and apply the same to effect necessary repairs to the remainder of the debuttar property.

As under section 32 of the Act the compensation money is placed in the custody of the Court, jurisdiction is by implication conferred upon it to deal with all questions that may arise as to the application of the fund in its custody.

RULE granted to the petitioner, Kamini Debi.

One Ram Kamal Mukherjee under a testamentary disposition made on the 4th of February, 1845, dedicated varions properties for religious and charitable purposes to an idol Gopaljiu, and appointed his daughter Kamini Debi, the petitioner, shebait of the idol. There had been litigation relating to the properties, but by a decision dated the 15th of December, 1909, the right of the petitioner to the office

* Civil Rule No. 4934 of 1910, against the order of Arthur Goodeve, Land Acquisition Judge of the 24-Parganas, dated Nov. 18, 1910.

1911

KAMINI DEBI v. PRAMATHA NATH MOOKERJEE.

of shebait was declared. Before the petitioner had been appointed shebait, a portion of the debuttar property had been acquired under the Land Acquisition Act at the instance of the Commissioners of the Port of Calcutta. The sum awarded as compensation was invested in Government securities. On the 24th of September, 1910, the petitioner applied to the Land Acquisition Judge for an order to pay her a portion of the compensation money to enable her to improve the debuttar property and to do necessary repairs to the buildings, in one of which the idol was located; this application was opposed by the representatives of the founder who had no present interest in the endowment. The learned Land Acquisition Judge having held that the petitioner was not absolutely entitled to the compensation money in her capacity as shebait, and that inasmuch as the Court had no machinery to exercise any effective control over the expenditure if money be placed at the disposal of the shebait, rejected the application.

Against this order the petitioner moved the High Court, and obtained this Rule.

Dr. Rash Behari Ghose and *Babu Satish Chandra Mukherjee*, for the petitioner.

Babu Mahendra Nath Roy, *Babu Manmatha Nath Mukherjee* and *Babu Biraj Mohan Mojumdar*, for the opposite party.

Cur. adv. vult.

MOOKERJEE and CASPERSZ, JJ. The substantial question of law, which calls for our decision in this Rule, relates to the true construction of section 32 of the Land Acquisition Act of 1894, and is apparently of first impression, in so far, at any rate, as the Courts

of this country are concerned. There is no controversy as to the circumstances under which the order of the Court below now under consideration was made. The petitioner before us is the present shebait of an idol, Gopaljiu, to whom considerable properties were dedicated by her father, Ram Kamal Mukherjee, under a testamentary disposition made on the 4th February, 1845. Ever since the foundation of the endowment there has been litigation relating to the properties, the most recent instance of which will be found reported in the case of *Aghore Nath Mukerjee* v. *Srimati Kamini Debi* (1). By this decision given on the 15th December, 1909, the right of the petitioner to the office of shebait was declared.

It appears that before the petitioner had been appointed shebait, a portion of the debuttar estate had been acquired, under the Land Acquisition Act, by the Government at the instance of the Commissioners of the Port of Calcutta. The sum awarded as compensation was invested in Government securities of the nominal value of Rs. 32,500. On the 24th September, 1910, the petitioner applied to the Land Acquisition Judge for an order to pay her Rs. 24,000 out of the compensation money, to enable her to improve the debuttar property, and execute necessary repairs to the buildings, in one of which the idol is located. This application was opposed by representatives of the founder, who have no present interest in the endowment, but may possibly, at some future time, succeed to the office of shebait. The Land Acquisition Judge dismissed the application on the 18th November without any enquiry into the merits. The learned Judge held that, as the petitioner was not absolutely entitled to the compensation money in her

(1) (1909) 11 C. L. J. 461.

1911

KAMINI DEBI v. PRAMATHA NATH MOOKERJEE.

capacity as shebait, she could not claim to draw any portion of the invested funds; and that, in any event, the money ought not to be placed at her disposal, because the Court had no machinery to exercise any effective control over the expenditure.

The petitioner obtained this Rule on the 28th November, 1910, for reversal of the order in question, on the ground that the learned Judge had erroneously refused to exercise the jurisdiction vested in him by law. In support of the Rule it has been contended that the terms of section 32 are comprehensive enough to authorise the Land Acquisition Judge to allow the petitioner to spend a portion of the compensation money with a view to effect necessary repairs to the debuttar property; this position, it has been maintained, is established by the cases of *Exp. Rector of Grimoldby* (1). *In re Aldred's Estate* (2), and *Exp. Rector of St. Botolph* (3). In answer to this contention it has been argued by the learned vakil for the opposite party that repairs and permanent improvements do not fall within clause (*1*) or clause (*2*) of section 32 of the Land Acquisition Act, and in support of this view reference has been made to the cases of *Drake* v. *Trefusis* (4). *In re Leigh's Estate* (5), *In re Nether Stowey Vicarage* (6), *Brunskill* v. *Caird* (7), *Exp. Rector of Newton Heath* (8), *In re Venour's Settled Estate* (9), *Vine* v. *Raleigh* (10), and *In re Jerard's Settled Estate* (11). The question raised is of considerable importance, and by no means free from difficulty; the solution of it must obviously

(1) (1876) 2 Ch. D. 225.
(2) (1882) 21 Ch. D. 228.
(3) (1894) 3 Ch. D. 544.
(4) (1875) L. R. 10 Ch. App. 364.
(5) (1871) L. R. Ch. 6 App. 887.
(6) (1873) L. R. 17 Eq. 156.
(7) (1873) L. R. 16 Eq. 493.
(8) (1896) 44 W. R. 645.
(9) (1876) 2 Ch. D. 526.
(10) (1891) 2 Ch. 13.
(11) (1893) 3 Ch. 252.

depend upon the true construction of the statutory provisions on the subject.

Section 32 of the Land Acquisition Act provides for the investment of compensation money deposited in respect of lands belonging to persons incompetent to alienate the same. The section lays down that when the money has been invested in Government or other approved securities, the Court shall direct the payment of the interest or other proceeds arising from such investment to the person or persons who would, for the time being, have been entitled to the possession of the said land, and such moneys shall remain so deposited and invested until the same be applied, (*i*) in the purchase of such other lands as aforesaid, that is, other lands to be held under the like title and conditions of ownership as the land in respect of which the compensation money shall have been deposited was held, or (*ii*) in payment to any person or persons becoming absolutely entitled thereto.

Two questions manifestly arise upon the construction of this section, namely, *first*, whether the land acquired belonged to a person who had no power to alienate the same, in other words, whether, when debuttar land has been acquired, the provisions of the section for investment of the compensation money may at all be brought into operation; and, *secondly*, if the provisions of the section are applicable, whether the shebait is entitled to withdraw any portion of the invested funds and apply the same to effect necessary repairs to the remainder of the debuttar estate.

In so far as the first of these questions is concerned, we are inclined to the view that land dedicated for religious and charitable purposes is land which may properly be described as belonging to a person who has no power to alienate the same. No doubt, in the case of land dedicated to an idol, the idol may be

1911

KAMINI DEBI v. PRAMATHA NATH MOOKERJEE.

deemed as the person to whom the land belongs, but, as was pointed out by their Lordships of the Judicial Committee in *Jagadindra Nath Roy* v. *Hemanta Kumari Debi* (1), although there is no doubt that an idol may be regarded as a juridical person capable as such of holding property, it is only in an ideal sense that property is so held, and assuming the religious dedication to have been of the strictest character, the fact remains that the possession and management of the dedicated property belong to the shebait. This carries with it the right to bring whatever suits are necessary for the protection of the property, and every such right of suit is vested in the shebait, not in the idol. Without any undue violence, therefore, to the language used by the Legislature in section 32, sub-section (*1*), we may hold that when land dedicated to an idol or to religious and charitable purposes generally has been acquired, it is land belonging to the shebait or trustee who had no power to alienate the same. We are further of opinion that no difficulty is created by the expression " who has no power to alienate the same," because, although the shebait may, in special cases, have the power to alienate a portion of the debuttar estate, he is ordinarily incompetent to deal with the corpus of the dedicated property. Consequently when such dedicated property is acquired under the Land Acquisition Act, the presumption is that it belonged to a person not competent to alienate it; and therefore the provisions of section 32 may be brought into operation: see *Mrinalini Dasi* v. *Abinash Chandra Dutt* (2) (where section 32 of the Land Acquisition Act was held to apply to cases in which land in possession of a Hindu widow as heiress

(1) (1904) I. L. R. 32 Calc. 129; L. R. 31 I. A. 203.

(2) (1910) 11 C. L. J. 533.

to her husband is acquired, although in certain contingencies a Hindu widow may be competent to alienate absolutely a part of the estate inherited by her from her husband). We must consequently hold that in the case before us the compensation money was rightly invested under section 32 of the Land Acquisition Act, and this is the settled practice of the Land Acquisition Court.

In so far as the second question is concerned, the answer depends upon the effect to be attributed to clauses (*i*) and (*ii*) of section 32, sub-section (1) of the Land Acquisition Act. The learned vakil for the petitioner has contended that the terms of clause (*i*) are comprehensive enough to justify the application of a portion of the compensation money to effect repairs absolutely essential for the preservation of the remainder of the property. It may be observed that the clause relied upon speaks of the application of the compensation money in the *purchase* of other lands, and, *primâ facie*, it is not easy to see how money, applied for the purpose of repairs, however necessary they may be, can be deemed to be money applied for the purchase of land. But the learned vakil for the petitioner has argued that the clause in question is based on section 69 of the Lands Clauses Consolidation Act, 1845, and ought to be interpreted in the same manner as the corresponding section of the English statute. This, in our opinion, is a legitimate mode of interpretation of statutory provisions, because, as observed by Blackburn, J., in *Mersey Docks* v. *Cameron* (1), where an Act of Parliament has received a judicial construction putting a certain meaning on its words, and the Legislature in a subsequent Act in *pari materia* uses the same words, there is a presumption that the

(1) (1865) 11 H. L. C. 443, 480.

1911

KAMINI DEBI v. PRAMATHA NATH MOOKERJEE.

Legislature used those words intending to express the meaning which it knew had been put upon the same words before, and unless there is something to rebut that presumption, the Act should be so construed, even if the words were such that they might originally have been construed otherwise. In other words, as James, L. J., put it in *Exp. Campbell* (1), where once certain words in an Act of Parliament have received a judicial construction in one of the superior Courts and the Legislature have repeated them, without any alteration, in a subsequent statute in *pari materia*, the Legislature must be taken to have used them according to the meaning which a Court of competent jurisdiction has given them. To the same effect is the observation of Sir John Jervis, C.J., in *Ruckmaboye* v. *Lulloobhoy Mottichund* (2) that when words in a statute have been judicially construed to have a certain meaning, and have been adopted by the Legislature in a subsequent statute in *pari materia*, they must be construed according to the sense in which they have been previously used, although that sense may vary from the strict literal meaning of them. Now, in the case before us, section 69 of the Lands Clauses Consolidation Act, 1845, upon which section 32 of the Land Acquisition Act is modelled, provides—we need only quote so much of the section as is relevant to our present purpose—as follows:

"If the compensation which shall be payable in respect of any lands or any interest therein taken by the promoters of the undertaking from any person having a partial or qualified interest only in such lands and not entitled to sell or convey the same, the same shall be paid into the Bank in the name and with the privity of the Accountant-General of the Court of Chancery; and such moneys shall remain so deposited, until the same be applied to some one or more of the following purposes, that is to say, (i) in the purchase or redemption of the land tax or the discharge of any

(1) (1870) L. R. 5 Ch. App. 703. (2) (1852) 5 Moo. I. A. 234, 250.

debt or encumbrance affecting the land; or (ii) in the *purchase* of other lands to be conveyed, limited and settled upon the like uses and purposes, and in the same manner as the lands in respect of which such money shall have been paid stood settled; or (iii) if such money shall be paid in respect of any buildings, in removing or replacing such buildings, or substituting others in their stead; or (iv) in payment to any party becoming absolutely entitled to such money."

It will be observed that the second clause in this provision corresponds with the first clause in section 32 of the Land Acquisition Act. Now, with reference to this clause, it has been held in numerous decisions in England that the Court may sanction the application of the compensation money to effect repairs and improvements upon the remainder of the trust property. But the learned vakil for the opposite party has contended that the decisions in England are by no means uniform and that no rule can be deduced from them to be applied in the construction of our statute. It may be conceded that there has been some divergence of judicial opinion upon this point in England, and that the cases are by no means easy to reconcile. But upon an examination of the authorities, to which we shall presently refer, the following rules will be found to be deducible:

(i) Ordinary repairs are not payable out of capital monies; they must be borne out of income; but the Court may authorise an expenditure in the nature of repairs, for the preservation of the trust estate, in cases amounting to salvage. The cases of *In re Leigh's Estate* (1), *Clarke* v. *Thornton* (2), *Exp. Barrett* (3), *In re Venour's Settled Estates* (4), *Drake* v. *Trefusis* (5), *In re Vicar of Queen's Camel* (6), and *In re Belfast Water Commissioners* (7), afford illustrations of the

(1) (1871) L. R. 6 Ch. App. 887.
(2) (1887) 35 Ch. D. 307.
(3) (1850) 19 L. J. Ch. 415.
(4) (1876) 2 Ch. D. 522.
(5) (1875) L. R. 10 Ch. App. 364
(6) (1863) 11 W. R. (Eng.) 503
(7) (1870) I. R. 5 Eq. 63.

1911

KAMINI DEBI v. PRAMATHA NATH MOOKERJEE.

first branch of this Rule; see also *In re Montagu* (1) and *In re Partington* (2). As an illustration of the second branch of the rule, reference may be made to *In re Aldred's Estate* (3) where the proposed expenditure which was sanctioned was found necessary to the preservation of the trust estate: see also *Exp. Rector of Grimoldby* (4).

(ii) Where there is a right of re-entry or a statutory power of sale, if repairs are not done, the compensation money deposited in Court may, with its sanction, be applied for the purpose of repairs. As illustrations, reference may be made to *In re Davie's Estate* (5) and *In re Barney* (6), where, if repairs had not been effected, action would have been taken by the authorities under the Metropolitan Building Act and the Public Health Acts, respectively. In the former of these cases which appears to be one of the earliest in which a question arose as to the true interpretation of section 69 of the Lands Clauses Consolidation Act, 1845, Knight Bruce, L.J. and Turner, L.J., held that whether the case was or was not within the words of the Act of Parliament, it was plainly within its equity and spirit, and reference was made to an earlier case decided in the same manner by Lord Eldon.

(iii) The purchase money of glebe lands or ecclesiastical lands may be applied in improvements and in the purchase of other lands. Illustrations of this rule may be found in *Exp. St. Botolph* (7) and *Brunskill* v. *Caird* (8), while *In re Nether Stowey Vicarage* (9),

(1) (1897) 2 Ch. 8.
(2) (1902) 1 Ch. 711.
(3) (1882) 21 Ch. D. 228.
(4) (1875) 2 Ch. D. 225.
(5) (1858) 3 De G. & J. 144.
(6) (1894) 3 Ch. 562.
(7) (1894) 3 Ch. 544.
(8) (1873) L. R. 16 Eq. 493.
(9) (1873) L. R. 17 Eq. 156.

Exp. Hartington (1), are cases on the other side of the line.

(iv) The Court may order money in deposit representing the compensation for a church-yard to be applied towards the repair of the chancel or the chapel, and even to pay the Parliamentary costs of the Rector. An illustration of this rule will be found in *Exp. Pennington* (2).

(v) Where rebuilding is necessitated by the dilapidated state of the buildings, the money in Court will not be applied to such rebuilding when the costs have already been met by the Rector: *Williams* v. *Aylesbury Railway Co.* (3), *Exp. Rector of Newton Heath* (4), and *In re Stock's Estate* (5); on the other hand, *Mathews* v. *Wilson* (6) is apparently an authority for the contrary view. The case of *Vine* v. *Raleigh* (7) merely exemplifies the distinction between a trust to purchase land and a trust to effect repairs, while the cases of *In re Gerard's Settled Estate* (8) and *In re Thomas* (9) which turned upon the construction of the Settled Land Act, 1890, have no direct application to the case before us.

The first and fourth of these rules shew that the Court has repeatedly allowed part of the deposit money to be applied for repairs of the trust estate, specially when, but for such repairs, statutory action might be taken against the trustee. That this position may be supported in this country on grounds of justice, equity, and good conscience is manifest. It is for the benefit of the community that the land is taken for

(1) (1875) 32 L. J. 243 ; 23 W. R. 484.
(2) (1901) 48 L. J. 808 ; 17 T. L. R. 614.
(3) (1874) L. R. 9 Ch. App. 684.
(4) (1896) 44 W. R. 645.
(5) (1880) 42 L. T. 46.
(6) (1883) W. N. 111.
(7) (1891) 2 Ch. 13.
(8) (1893) 3 Ch. 252.
(9) (1900) 1 Ch. 319.

1911

KAMINI DEBI v. PRAMATHA NATH MOOKERJEE.

public purposes. The principle on which this power is exercised was thus stated by Grotius in 1625 (De Jure Belli et. Pacis, Lib. IIIC, 20, sec. 7, Eng. Tr. 1738, p. 697; Whewell, p. 417): "The property of subjects is under the eminent domain of the State, so that the State or he who acts for it may use and even alienate and destroy such property, not only in the case of extreme necessity, in which even private persons have a right over the property of others, but for ends of public utility, to which ends those who founded civil society must be supposed to have intended that private ends should give way. But it is to be added that when this is done, the State is bound to make good the loss to those who lose their property." Hence, as such power is exercised for the benefit of the public, interference with private right need not exceed the limits essential for that purpose and that purpose alone. Consequently, the Legislature has provided that when land belonging to a person with a qualified power of alienation has been acquired under the statute, the money should be held in deposit so that the ultimate beneficiaries may not be prejudiced. Money can be shuffled out of sight as land can not be. So long, therefore, as the property continues in the shape of land, the beneficiaries are amply protected against unauthorised alienation by the trustee; but if when the land has been converted into money, the funds are placed at the absolute disposal of the trustee, the beneficiaries may be left without adequate remedy, if the fund is improperly applied by the trustee. Consequently, as pointed out by this Court in the case of *Mrinalini Dasi* v. *Abinash Chandra Dutt* (1), even when land has been converted into money by reason of proceedings under the Land Acquisition Act, the

(1) (1910) 11 C. L. J. 533.

money ought to be regarded as still impressed with the character of real estate: *Kelland* v. *Fulford* (1), *Exp. Walker* (2), *In re Harrop's Estate* (3), *Midland Counties Ry. Co.* v. *Oswin* (4), and *In re East Lincolnshire Ry. Co.* (5); as to the last of these cases, see *In re Tugnell* (6). In other words, the position of the parties is by legal fiction deemed to be the same as if the land had never been converted into money; their rights and obligations are not affected by the transformation. But if this doctrine is maintained for the protection of the beneficiaries, it ought not also to be applied to fetter the trustee needlessly.

This rule is recognised in other systems of jurisprudence as well founded on broad principles of justice, equity and good conscience. Thus, in the case of *In re Board of Street Opening* (7), the Supreme Court of New York held that where an award has been made for land of a lunatic taken for public purposes, the compensation money is to be treated as real estate for all purposes, so that the Committee would not be entitled to absolute possession; it would be retained in Court to be applied in the same manner and for the same purposes as the real estate might have been applied if it had never been converted into money: see also *Exp. Van Vorst* (8), *Brown* v. *Rome Ry. Co.* (9), *Peavey* v. *Wolfborough* (10). The same question was raised in the case of *Kearney* v. *Kean* (11), where the land acquired belonged to a person who had not

(1) (1877) 6 Ch. D. 491.
(2) (1853) 1 Drew. 503.
(3) (1857) 3 Drew. 726.
(4) (1844) 1 Coll. 80; 13 L. J. Ch. 209.
(5) (1851) 1 Sim. N. S. 260.
(6) (1884) 27 Ch. D. 309.
(7) (1895) 35 N. Y., Sup. 409; 89 Hun. 525.
(8) (1840) 2 N. J. Eq. 292.
(9) (1888) 86 Ala. 206; 5 South. 195.
(10) (1858) 37 N. H. 286.
(11) (1879) 3 Cana. Sup. Ct. Rep. 332.

1911

KAMINI DEBI v. PRAMATHA NATH MOOKERJEE.

an absolute power of disposition over it. The Supreme Court held that the fund must still be considered as land and must be retained in Court to be dealt with in the same manner as the land could have been treated if there had been no conversion.

In the case before us, there is no room for controversy that if the land had never been converted into money it would have been competent to the shebait to alienate a portion of it for repairs essential for the preservation of the debuttar estate: *Deva Siiamani* v. *Palaniyappa* (1). It would therefore not be right to place such a construction upon the provisions of the Land Acquisition Act as would paralyse the management of the endowment. The cardinal principle is that the endowment is not to be prejudiced by reason of the transformation of the land into money; but such prejudice may result not only if the fund placed absolutely at the disposal of the shebait is misapplied by him, but also if the fund, treated as unalterably invested, is placed permanently beyond the reach of the shebait who can under no circumstances avail himself of a portion of it to meet the most urgent and paramount needs of the endowment. We are of opinion, therefore, that we should follow the principles deducible from the decisions on section 69 of the Lands Clauses Consolidation Act, 1845, and interpret section 32 of the Land Acquisition Act liberally so as to enable the Court to deal with the fund in its custody for the ultimate benefit of the endowment.

It may be added that the second clause of section 32 may, if liberally interpreted, seem at first sight comprehensive enough to cover the case before us. The statute provides that the money is to remain deposited and invested until it can be applied either

(1) (1910) 20 Mad. L. J. 969.

in the purchase of other lands or in payment to any person becoming absolutely entitled thereto. The language of this provision would, however, be unduly strained if we were to hold that a shebait becomes absolutely entitled to such portion of the fund as may be needed for the protection of the debuttar estate. The corresponding expression "absolutely entitled to such money" in section 69 of the Lands Clauses Consolidation Act, 1845, has been interpreted to mean "entitled to his or her own use": *Kelland* v. *Fulford* (1). A trustee can, therefore, be hardly regarded as a person absolutely entitled, and the decision in *In re Hobson's Trust* (2), which supports the view that trustees may be treated as persons absolutely entitled, was doubted in *In re Smith* (3). It is worthy of note, however, that in *Exp. Trustees of Tid* (4), the Court allowed the purchase money of charity property acquired by a Railway Company to be paid to the trustees of the charity: see also *In re Lathropp's Charity* (5), and *Mayor of Sheffield* v. *Trust es of St. William's School* (6). On the other hand, the Court ordered the fund to be invested and the dividend to be paid out to the treasurer of the charity in *Exp. Governors of Norfolk Clergy* (7), while in *In re Faversham Charities* (8), it was ruled that the proceeds of the sale of charity lands could not be paid out of Court to the trustees of the charity without the consent of the Charity Commissioners: see also *In re Spurstowe's Charity* (9), *In re Hobson's Trust* (10), *Exp. St. Alphege* (11), and *In re Clergy*

(1) (1877) 6 Ch. D. 491.
(2) (1870) 7 Ch. D. 708.
(3) (1888) 40 Ch. D. 386.
(4) (1868) 17 W. R. (Eng.) 758.
(5) (1866) L. R. 1 Eq. 467; 35 Beav. 297.
(6) (1903) 1 Ch. 208.
(7) (1882) W. N. 53.
(8) (1862) 5. L. T. 787.
(9) (1874) L. R. 18 Eq. 279.
(10) (1878) 47 L. J. Ch. 310.
(11) (1886) 55 L. T. 314.

1911

KAMINI DEBI v. PRAMATHA NATH MOOKERJEE.

Orphan Corporation (1). On the whole, we are inclined to the view that a shebait cannot rightly be described as a person absolutely entitled to the fund even when it is established that part of the fund is needed to be applied for the protection of the debuttar estate. The shebait, even if the fund is placed at his disposal, can apply it only for the purpose of the endowment, and cannot, therefore, be properly described as a person absolutely entitled thereto. We, therefore, prefer to rest our decision on the ground that the case falls within the first clause of section 32 of the Land Acquisition Act, interpreted in the light of the decisions on section 69 of the Lands Clauses Consolidation Act, 1845, from which the provisions of the Indian Statute have been borrowed.

The learned vakil for the opposite party has, however, contended that in any view of the matter, the Land Acquisition Judge has no jurisdiction to deal with an application of this kind, and he has suggested that the proper course for the shebait to adopt is to bring a suit in the Civil Court. There is, in our opinion, no substance in this contention. In the first place, if the literal construction suggested on behalf of the opposite party is adopted, and if it is ruled that the compensation money must remain deposited and invested till it can be applied in the purchase of other lands, in the strict sense of the expression, a suit for declaration that in the events which have happened a part of the fund can be applied for the protection of the endowment, would be futile, for no Court would be competent to make a decree in contravention of the provisions of the statute as interpreted by the opposite party. In the second place, it is difficult to appreciate against whom

(1) (1894) 3 Ch. 145.

such suit could be brought. It has been suggested that the person next entitled to succeed to the office of shebait may be joined as defendant; but it is conceivable that such person might not be in existence at the time when the contingency happened. Moreover, if such person gave his consent to the application of the fund, the position would not be improved. The concurrence of two persons, each of whom when in office has a qualified right of alienation, cannot strengthen the position of either of them.

But the learned vakil for the opposite party has further contended that as section 32 does not expressly define the mode in which an application of the character now before us should be made and entertained, the Court has no jurisdiction to take cognizance of the matter. We are unable to give effect to this contention as well founded. It is possible that the precise contingency, which has happened in this case, was not contemplated by the framers of the statute. But upon first principles the position may be justified that as under section 32 the fund is placed in the custody of the Court, jurisdiction is by implication conferred upon the Court to deal with all questions that may arise as to the application of the fund in its custody. The true maxim of our law is, as Lord Abinger said in *Russel* v. *Smyth* (1), to amplify its remedies and without usurping jurisdiction to apply its rules to the advancement of substantial justice. Again, as was pointed out by Domat in a well-known passage (Civil Law, 12, 17), quoted in the judgment of this Court in the case of *Mrinalini Dasi* v. *Abinash Chandra Dutt* (2), "Since laws are general rules, they cannot regulate the time to come so as to make express provisions against all inconveniences which are

(1) (1842) 9 M. & W. 810, 818; 60 R. R. 904. (2) (1910) 11 C. L. J. 533.

1911

KAMINI DEBI v. PRAMATHA NATH MOOKERJEE.

infinite in number and that their dispositions should express all the cases that may possibly happen. It is, therefore, the duty of the Judges to apply the laws not only to what appears to be regulated by their express dispositions, but to all the cases where a just application of them may be made, and which appear to be comprehended within the express sense of the law or within the consequences that may be gathered from it." The Land Acquisition Judge has obviously jurisdiction to make an enquiry when a claim to the fund is put forward by a person who asserts that he has become entitled thereto, or when it is suggested that suitable land is available for the purchase of which the fund may be applied. On the principles explained above, we must therefore hold that the Land Acquisition Judge has ample authority to deal with the question under consideration, and to pass such orders in the matter as the interests of justice demand. In our opinion the conclusion is irrevitable that the application by the shebait to withdraw a portion of the compensation money in deposit must be entertained and investigated on the merits.

It is now necessary to give directions as to the manner in which the enquiry should be conducted, and the lines on which the final order should be given. Some guidance in this respect is afforded by the procedure adopted in the case of *In re London County Council, Exp. Pennington* (1). The Court will first take evidence as to the truth or otherwise of the allegations made in the petition of the shebait. Possibly, one expert witness on the side of the petitioner and another on the side of the objector may be sufficient for the purpose, though we do not desire to hamper the discretion of the lower Court in this

(1) (1901) 84 L. T. 808.

matter. As the properties in question are situated at a short distance from the Court premises, it is possible that a local investigation by the learned Judge himself might facilitate the determination of the question of the present condition of the debuttar properties.

If it is proved that the debuttar properties need repairs and improvements, such as cannot be effected out of the current income, the shebait should be called upon to submit an estimate of the cost by a reliable firm of contractors; the objector must be afforded an opportunity to examine, and, if necessary, to challenge the estimate. After the estimate has been settled by the Court, the work will be entrusted (on a formal contract) to a firm of contractors selected or approved by the Court; and as the work progresses, such portion of the fund in deposit as may be needed for the purpose will from time to time be paid to the contractors.

We observe in this connection that it is alleged in the petition of the shebait that part of the property is in such an insanitary condition that action has been taken by the Calcutta Municipal Corporation, and she has already been fined. If this is established, suitable steps must be taken for the improvement of the property; and in this contingency the case will fall within the first and second rules laid down above. On behalf of the objectors it has been stated, on the other hand, that they apprehend that, as the shebait is a purdanashin Hindu lady advanced in years, the work of repair and improvement cannot, possibly, be supervised by her personally; and that, if any large sum is placed at her disposal, it may be misapplied by her advisers and dependents who, it is alleged, are impecunious. We are not in a position to express any opinion as to the truth of these allegations. The Judge will be able to pay the contractors after calling

1911

KAMINI DEBI v. PRAMATHA NATH MOOKERJEE.

for a report from some expert, and this procedure should be noted in the contract to execute the work. The Court has ample power to give suitable directions, so that a proper contract to complete the repairs and to effect the necessary improvements on the property may be made, verified, and carried out under its guidance. To enable the Court to determine what sum should be spent for the purpose, three elements must be taken into consideration, namely, *first*, the present condition of the property; *secondly*, the income of the endowment and the surplus left thereout after payment of the current expenses; and *thirdly*, the amount of compensation money in deposit. To sum up, the test to be applied is, whether the work undertaken is essential for the ultimate benefit of the endowment.

The result, therefore, is that this Rule must be made absolute, and the order of the Court below discharged. The case will be remanded to the Land Acquisition Judge, in order that he may deal with it on the lines indicated in this judgment. The costs of the Rule will abide the ultimate result of the proceedings in the Court below.

Rule absolute.

S. C. G.

APPELLATE CIVIL.

Before Mr. Justice Coxe and Mr. Justice Teunon.

ABHOY CHARAN JALIA

v.

DWARKA NATH MAHTO.*

1911

June 15

Fishery—Right to fishery in tidal and navigable river, how acquired—Limitation Act (XV of 1877), s. 26.

To establish an exclusive right of fishery in a tidal and navigable river, it is necessary to prove that the plaintiff's user was in assertion of a right other and higher than the general right of the public to fish.

Baban Mayacha v. *Nagu Shravucha* (1) and *Narasayya* v. *Sami* (2) relied on.

Quœre: Whether exclusive right of fishery in such a river can be acquired by proof of mere enjoyment in the manner provided in s. 26 of the Limitation Act of 1877 without a grant from the Crown.

Arzan v. *Rakhal Chunder Roy Chowdhry* (3), referred to.

Viresa v. *Tatayya* (4) not followed.

Secretary of State for India v. *Mathurabhai* (5) and *Nityahari Roy* v. *Dunne* (6), approved.

SECOND APPEAL by the defendants, Abhoy Charan Jalia and another.

The plaintiff sued to establish his prescriptive right to fish in a particular tract of the Daratana river in a particular way by a special sort of net for catching shrimps, and to be allowed to enjoy that right to the exclusion of others, and for mesne profits.

* Appeal from Appellate Decree, No. 1240 of 1908, against the decree of S. C. Ganguli, Subordinate Judge of Khulna, dated March 11, 1908, modifying the decree of Hem Chandra Das Gupta, Munsif of Bagerhat, dated April 30, 1907.

(1) (1876) I. L. R. 2 Bom. 19.
(2) (1888) I. L. R. 12 Mad. 43.
(3) (1883) I. L. R. 10 Calc. 214.
(4) (1885) I. L. R. 8 Mad. 467.
(5) (1889) I. L. R. 14 Bom. 213.
(6) (1891) I. L. R. 18 Calc. 652.

1911

ABHOY CHARAN JALIA v. DWARKA NATH MAHTO.

Defendants Nos. 1, 2 and 7 raised various objections of which the main one, as far as this second appeal was concerned, was that the plaintiff had no such exclusive right to fish in the river.

The Munsif held that the river, which was navigable throughout the year and tidal, belonged to the Government, but that the plaintiff had been catching shrimps with stake-nets for at least 30 or 40 years at the place openly, publicly, peacefully, without interruption and as of right, and the fact that other people fished in the locality in the same river with other kinds of nets did not and could not diminish the plaintiff's right to catch fish with stake-nets, and further that the fact that boats and steamers passed over the net and the plaintiff had to lower the rope sometimes for boats etc., to pass, did not in any way interfere with the acquisition of such right. The Munsif, on his findings, decreed the suit, holding that even if the plaintiff might acquire no right to enforce his prescriptive right against the Government, when the possession was of a shorter period than 60 years, there was no reason why such right should not be enforceable against others simply because the river belonged to Government.

On appeal by the contending defendants, the Subordinate Judge upheld the decision of the Munsif on the point of law, *viz.*, whether the plaintiff had acquired an exclusive prescriptive right to fish in the river.

The defendants, thereupon, appealed to the High Court.

Babu Jadu Nath Kanjilal, for the appellants. It being a public river, it is by law subjected to a kind of servitude in favour of all members of the State and no exclusive right can be claimed by the plaintiff; *In re*

Maharana Shri Jaswatsangji Fatesangji (1), *Smith* v. *Andrews* (2), *Luchmiput Singh* v. *Sadatulla Nusso* (3). In such a case no easement can be claimed under section 26 of the Limitation Act. There can be no right of easement in such a case against Government. A prescriptive right claimed against Government must be exercised for a period not less than 60 years: *Viresa* v. *Tatayya* (4), *Narasayya* v. *Sami* (5), *The Secretary of State for India* v. *Mathurabhai* (6).

No exclusive possession is made out, as other people also fished there. The plaintiff cannot therefore claim an exclusive right to fish in the river.

The use of stake-nets is a hindrance to free navigation in a public navigable river. It is a sort of nuisance. No length of time justifies a public nuisance, and no right can be claimed thereunder: *Mott* v. *Shoolbred* (7). See also Pollock on Torts, 8th Ed., p. 431.

Babu Sacheendraprasad Ghose, for the respondent. A right of easement under s. 26 can be claimed in regard to the Government property: *Chundee Churn Roy* v. *Shib Chunder Mundul* (8), *Arzan* v. *Rakhal Chunder Roy Chowdhry* (9).

If Section 26 applies to such a case, then the period must be 20 years and not 60 years. Exclusive possession is made out at least for 40 or 45 years. The findings are clear.

The question of nuisance was not raised in the Courts below. There is no evidence that there has been any public nuisance.

Cur. adv. vult.

(1) (1897) I. L. R. 22 Bom. 988, 993.
(2) (1891) 2 Ch. 678, 696.
(3) (1882) 12 C. L. R. 382.
(4) (1885) I. L. R. 8 Mad. 467.
(5) (1888) I. L. R. 12 Mad. 43.
(6) (1889) I. L. R. 14 Bom., 213.
(7) (1875) L. R. 20 Eq. 22, 24.
(8) (1880) I. L. R. 5 Calc. 945.
(9) (1883) I. L. R. 10 Calc. 214.

1911

ABHOY CHARAN JALIA v. DWARKA NATH MAHTO.

COXE and TEUNON, JJ. The suit out of which this appeal arises was framed as one for the recovery of possession of a certain portion of the river Daratana on establishment of plaintiff's right to fish therein.

A Civil Court *amin* was deputed to locate the site of plaintiff's alleged fishery and the tract of river in dispute, and it was thereupon found that what plaintiff claimed was (i) the exclusive right to fish for shrimps or prawns by means of a stake-net placed across the river and fastened to posts fixed at stations 1 and 13 on the map prepared by the *amin*, and (ii) the right to prevent the defendants and others from placing any similar stake-net across the river at any point between his net and stations 17 and 18, some 600 yards to the north, and stations 3 and 8, a similar distance to the south.

As it appeared that shrimps are caught only at ebb-tide, when the current is from north to south, the plaintiff-respondent's claim in respect of the portion of the river lying to the south of stations 1 and 13 has been dismissed, but the plaintiff has been given a decree declaring his exclusive right to fish by means of a stake-net at stations 1 and 13, and restraining the defendant from placing any stake-net across the river between those stations and stations 17 and 18 to the north.

The findings on which this decree is based are that at the site in question the plaintiff has been catching shrimps by means of stake-nets for the last 30 or 40 years openly, publicly, peacefully, without interruption and as of right.

It has been found that the river Daratana is a tidal and navigable river, and the decree is therefore assailed in appeal substantially on two grounds, viz., (i) that in public waters an exclusive right of fishery cannot be acquired as an easement under section 26

of the Limitation Act (XV of 1877), and (ii) that the user of the plaintiff should have been referred to the general or common right of all members of the public to fish in this tidal and navigable river.

It appears to be now settled that private rights of fishery in public waters may be acquired either by a grant from the Crown or by prescription from which a grant may be presumed: *vide* the cases of *Hori Das Mal* v. *Mahomed Jaki* (1), *Satcowri Ghosh Mondal* v. *Secretary of State* (2), *Viresa* v. *Tatayya* (3). In the present case there is no suggestion of any grant, and the question therefore is whether the exclusive right of fishery in a tidal and navigable river can be acquired by proof of mere enjoyment in the manner provided in section 26 of the Limitation Act, 1877. In the case of *Arzan* v. *Rakhal Chunder Roy Chowdhry* (4), the point was apparently not taken and it was tacitly assumed that the provisions of the Limitation Act as regards easements were applicable as against the Crown. But in the case of *Viresa* v. *Tatayya* (3), the contrary assumption was apparently made, and in the case of *Secretary of State* v. *Mathurabhai* (5), two learned Judges of the High Court of Bombay indicated the opinion, but did not decide that the provisions of section 26 of the Limitation Act were not applicable for the acquisition of easement as against the Crown. This view appears also to find support in the case of *Nityahari Roy* v. *Dunne* (6), where the question was with respect to an exclusive right of ferry. Though, speaking for myself, I am inclined to agree in the reasoning of the learned Judges in the case already cited, from I. L. R. 14 Bom. 213, we do not think it necessary to decide the

(1) (1885) I. L. R. 11 Calc. 434.
(2) (1894) I. L. R. 22 Calc. 252.
(3) (1885) I. L. R. 8 Mad. 467.
(4) (1883) I. L. R. 10 Calc. 214.
(5) (1889) I. L. R. 14 Bom. 213.
(6) (1891) I. L. R. 18 Calc. 652.

1911

ABHOY CHARAN JALIA v. DWARKA NATH MAHTO.

question, as in our opinion the second contention of the appellants must prevail.

As we have stated, no grant of the exclusive right of fishery now claimed has been proved as suggested. It is clear therefore that when the plaintiff first began to fish at the site in question, he did so in the exercise of the common right which he shared with all members of the public. When, if ever, the assertion of this general right developed into an assertion of an exclusive right does not appear. Reliance has been placed on certain criminal proceedings in 1897 and in 1903, when, in the first case, certain persons were bound down to keep the peace, and, in the second case, others were successfully prosecuted for cutting down plaintiff's extended net. But obviously wanton or malicious disturbance of the plaintiff when engaged in the peaceful exercise of his common right renders the wrongdoers liable to punishment, and these cases therefore do not advance his present claim.

There is authority in the case of *Baban Mayacha* v. *Nagu Shravucha* (1) and *Narasayya* v. *Sami* (2), for the proposition that the method of exercising the common right may be regulated by custom, and had the plaintiff's claim been of this nature and been supported by satisfactory evidence, plaintiff might possibly have obtained a certain measure of relief, but in the absence of circumstances indicating that the plaintiff's user was in assertion of a right other and higher than the general right, it can be referred only to such general or common right and his present suit must therefore fail. The appeal is therefore decreed and plaintiff's suit dismissed. Under the circumstances, we think it right that parties should bear their own costs throughout.

S. M. *Appeal allowed.*

(1) (1876) I. L. R. 2 Bom. 19. (2) (1888) I. L. R. 12 Mad. 43.

APPEAL FROM ORIGINAL CIVIL.

Before Sir Lawrence Jenkins, K.C.I.E., Chief Justice, and Mr. Justice Woodroffe.

PAUL

v.

ROBSON.*

1911

Aug. 1.

Easement—Light and air—Ancient lights, infringement of—Limitation Act (IX of 1908), s. 26, scope of—Nuisance—Measure of right—Previous enjoyment—Interlocutory Injunction, technical breach of—Inquiry as to damage, refusal of—Form of decree—Costs.

An action for the infringement of the easement of light and air is founded not on trespass, but on nuisance.

To amount to an actionable nuisance, the interference, in the case of a house suitable for residence and business purposes, where the selling and letting value has not been diminished, must cause a sensible privation of light and air, sufficient to render the occupation of the house uncomfortable and to a sensible degree less fit for the purposes of business.

In an action for infringement, the character of the previous enjoyment of the dominant tenement must be taken into consideration, but it does not furnish the decisive measure of the "unlawful hurt or annoyance."

Colls v. *Home and Colonial Stores, Ld.* (1), *Kine* v. *Jolly* (2), *Higgins* v. *Betts* (3) considered. *Bagram* v. *Khettra Nath Karformah* (4), *Modhoosoodun Dey* v. *Bissonauth Dey* (5) and *Delhi and London Bank* v. *Hem Lall Dutt* (6) referred to.

To determine whether a nuisance has been proved, the existing state of things must be considered, but subject to the qualification that light and air coming from other sources, to which a right has not been acquired by grant or prescription, ought not to be taken into account.

Colls v. *Home and Colonial Stores, Ld.* (1), *Jolly* v. *Kine* (7), and *Kine* v. *Jolly*, (2), followed.

* Appeal from Original Civil, No. 27 of 1911.

(1) [1904] A.C. 179.
(2) [1905] 1 Ch. 480.
(3) [1905] 2 Ch. 210.
(4) (1869) 3 B. L. R (O. C.), 18.
(5) (1875) 15 B. L. R. 361.
(6) (1887) I. L. R., 14 Calc. 839.
(7) [1907] A.C. 1.

1911

PAUL v. ROBSON.

APPEAL by the plaintiffs, P. C. E. Paul and another, from the judgment of Stephen, J.

This appeal arose out of a suit alleging interference with ancient lights and claiming relief by way of injunction, mandatory and preventive, and damages.

The plaintiffs were Peter Charles Ernest Paul and his wife, Mrs. Paul, who had successive life interests in the premises No. 7, Esplanade East in Calcutta, under a marriage settlement of which Mr. Paul and Mr. MacNair, solicitor, were co-trustees. The first four defendants, including Mr. William Robson, were members of Messrs. Mackintosh Burn & Co., and the owners of the premises No. 8, Esplanade East, which were contiguous to, and to the east of, the plaintiffs' premises. Mr. MacNair was added as a *pro forma* defendant on his refusal to join as plaintiff in the action.

The plaintiffs' building was an old three-storied house, facing south and fronting on Esplanade East, with an uninterrupted prospect over the Calcutta maidan. It had 27 openings on its eastern face, and it was the light and air coming through these openings that the plaintiffs alleged had been interfered with by certain building operations at No. 8, Esplanade East. Of these 27 openings, windows Nos. 1 to 18 were the more important ones, and the case was not seriously pressed as regards the remaining openings which belonged chiefly to kitchens, godowns and bathrooms. It was not disputed that all these openings were ancient.

The windows Nos. 1 to 18 were distributed as follows:—Nos. 1 & 4, Nos. 7 & 8 and Nos. 13 & 16 belonged to rooms Nos. I, II and III, respectively, on the groudd floor: windows Nos. 2, 5, 8, 11, 14 and 17 belonged to the single large room which extended through the length of the first floor: windows Nos. 3

and 6, Nos. 9 & 12, and Nos. 15 & 18 belonged, respectively, to rooms Nos. I, II & III on the second floor. Room No. I on the ground floor, the large single room on the first floor and room No. 1 on the second floor, had other windows on the south and west: room No. II on the ground floor and room No. II on the second floor had other windows on the west. Window No. 7 had been bricked up for some considerable time, and relief as regards that window was abandoned at the trial.

The defendant firm's former buildings were at a distance of 17 feet from the plaintiffs' structure and consisted of a one-storied building 21 feet high, fronting on Esplanade, and a two-storied building to the north, 42 feet high, separated from the front portion by an open passage.

The defendant firm's new building was a five-storied structure raised at the same distance of 17 feet from the plaintiffs' building. There was a considerable conflict of testimony at the hearing of the action as to the progress of the defendants' building, the height reached on various dates and the plaintiffs' knowledge of the building operations from time to time. But in view of the judgments of the Courts of first instance and appeal, it is unnecessary to enter into the details. It was alleged by the defendant firm (and borne out by documentary evidence) that the demolition of their old buildings was commenced about the latter end of May 1909, and the new buildings were commenced in June of the same year. The dates on which the floors of their new buildings were reached were as follows:—

(*a*) First floor level, except the front wall, on or by the middle of August 1909.

(*b*) Second floor level, except the front wall, on or by the end of September 1909.

1911

PAUL v. ROBSON.

(*c*) Third floor level, except the front wall, on or by the end of November 1909.

(*d*) Fourth floor level, except about 40 feet from the front, on or by the middle of January 1910. The front wall which was built of stone was in general about one floor behind the rest of the structure.

On the 26th January 1910 the plaintiffs gave the defendant firm formal notice of their ancient lights, and called upon them to desist from erecting their new building, and on the defendants refusing to do so, the present suit was instituted on the 4th February 1910. By this date the defendants' building practically along its whole length had been erected up to the fourth floor level, 64 feet high.

The plaintiffs contended that the infringement amounted to a nuisance, alleging that the light and air enjoyed through their eastern windows was reduced below the measure which is required for the ordinary purposes of inhabitancy or business of their building according to the ordinary notions of mankind and prayed for a mandatory injunction ordering the defendants to pull down their new buildings to the height of their former buildings, for a perpetual injunction restraining them from erecting the proposed fifth storey so as to interfere with the plaintiffs' ancient lights, and for damages in the alternative, assessed at Rs. 1,50,000.

On the 4th February 1910 a Rule was obtained, and the plaintiffs calling upon the defendants to shew cause why they should not be restrained until the final determination of the suit from further proceeding with the construction of their buildings so as to interfere with the plaintiffs' ancient lights, and an injunction was obtained restraining the defendants pending the disposal of the Rule.

1911

PAUL
v.
ROBSON.

On the 25th February 1910, Fletcher J. made the Rule absolute, restraining the defendants by injunction, "from further erecting the building now in progress on the site of No. 8, Esplanade East in Calcutta, so as to further interfere with or diminish the light and air coming to the 27 openings on the east wall of the plaintiffs' premises until the final determination of the suit"

On the 30th March 1910 the defendants filed their written statement denying that the erection of their new building, as it then existed, or the same if completed as intended, was or would be an interference with the access of light and air to the plaintiffs' premises, so as to cause a nuisance or to reduce the access and use of light and air to and from the plaintiffs' premises through the openings below the measure which was required for the ordinary purposes of inhabitancy or business according to the ordinary notions of mankind.

Pending the hearing of the suit, the defendants proceeded with the erection of the fifth storey, 15 feet high, set back at a distance of 24 feet from the western edge of their structure, and erected a tower as part of the fifth storey in the south-eastern corner, facing Esplanade, in accordance with their original plan. The Municipal Corporation thereupon called upon the defendants either to erect the tower on the south-western corner of the fifth storey according to the plans sanctioned by the Corporation, or to remove the south-eastern tower, so as to preserve architectural symmetry.

The defendants applied to the Court for leave to erect the south-western tower, alleging that this tower would not cause any appreciable interference with the plaintiffs' rights. Fletcher J. refused to entertain this application, and referred the defendants to the

1911

PAUL v. ROBSON.

terms of the order of the 25th February 1910. The defendants proceeded to erect the south-western tower. The plaintiffs thereupon applied for an order to commit the defendants for contempt, but Fletcher J. dismissed the application.

The original suit came on for hearing before Stephen J. on the 10th February 1911. On the 16th February *Mr. Buckland*, on behalf of the defendants, offered not to reduce the set-back of the fifth storey to less than 6 feet, which, as admitted by Mr. Esch, would not obstruct sky-light from the first floor any more than it is at present obstructed. This offer was not accepted. The nature and purport of the evidence given at the trial and the facts established are analysed and set out by Stephen J. in the following passages of his judgment:—

"In this view of the law I will now proceed to consider the facts to which it is to be applied. And first I will consider the case of the 17 windows which I have described as the important ones. It appears that whereas formerly a view of the sky was to be had from all the windows, slight on the ground floor, considerable on the middle floor, and uninterrupted on the top floor, now the ground and middle floor windows get no view of the sky, and the top floor windows get considerably less than the ground floor windows did before. From this it follows that the windows on the ground and middle floors have been deprived of all direct light, which I understand as being the same thing as a view of the sky, and that the view of the sky from the top floor has been very seriously diminished. The result is that the light coming to the plaintiffs' premises from the east has been obstructed. Some of the defendants' witnesses have expressed an opinion that this has been a positive benefit to the plaintiffs' premises, but the defendants' counsel, wiser than they in his generation, admits that the plaintiff has lost something, an amenity, namely, described as *delectatio habitantis*, but denies that this loss has caused a nuisance in whatever sense that word is to be understood.

The determination of the question of nuisance or no nuisance depends on the evidence of a considerable number of witnesses, but before considering this, I must notice certain facts about which, if they are not admitted, there can be no doubt. The house may be about fifty years old. For whatever purpose it was built, the use for which it is now suitable,

judging from the use made of other houses in the same position, and from the use which has lately been made of this house, is to have a shop or a business office on the ground floor, the same on the middle floor and a residence on the top floor. I further think that I am not straining the evidence on the record when I say that it is likely that the occupier of the residence on the top floor will be connected in some way with the business carried on one of the other floors.

Further, it is admitted on both sides that the premises are old fashioned, in that the possibility of having an attractive shop front on the south side of the house, which fronts Esplanade East, has been neglected.

The most important witnesses called to prove a nuisance are Mr. Esch and Mr. Mackinnon. The former, who speaks with the authority derived from a considerable and recent experience of the construction of important buildings in Calcutta, gave detailed evidence as to the light in nearly all the rooms in the plaintiff's house. What is in my opinion important from the present point of view is that, on the ground floor, room No. 1 is useful only as an entrance hall, and for that purpose is at present sufficiently well lit by light coming from the south and west. If the construction of the house were altered in rather an elaborate way, more light might be needed through the east windows, but this seems to be immaterial. Room No. 2 could formerly have been used as a show-room, now it could not. It obtains most of its light from the west. Room No. 3 could formerly have been used as an office, now it is only fit for a lumber room.

On the middle floor all the windows at present under consideration are in room No. 1 ; and under present conditions Mr. Esch seems to say that it gets plenty of light from the south, though leaving out the questions of the prospect and its being overlooked, it is not as pleasant as it used to be. As to the top floor, he considers that the rooms facing east are not as pleasant as they were, which in fact adds nothing to the facts demonstrated on Mr. Mackinnon's plan. Mr. Mackinnon adds but little to Mr. Esch's evidence beyond the plans that I have referred to. He speaks, it appears, with a good deal less authority than Mr. Esch, and much of his evidence is discounted by the admission in his cross-examination that the only complaint that could be made was in respect of the windows on the ground floor, particularly the windows in room No. 3, to which he afterwards added that in room No. 2.

Sir William Emerson's evidence I cannot regard as of much importance. The question of the angles at which direct light comes to the rooms has been more carefully considered by other witnesses, and he disclaimed any knowledge as to the amount of light that would be required for purposes for which the rooms might be ordinarily used. Colonel Pilgrim gave evidence that the absence of direct light made several rooms less healthy, as I

1911

PAUL
v.
ROBSON.

understand him, but an unfortunate difference of opinion between him and Major Calvert, the other medical witness called in the case, makes it impossible for me to attach any weight to this evidence.

On the other hand, the defendant has called a body of witnesses whose evidence is in my opinion entitled to great weight. This includes representatives of five important shops in Calcutta, namely, of Messrs. Hamilton & Co., Jewellers, Messrs. Harman & Co., Tailors, Messrs. Hall, Anderson & Co., Drapers, Messrs. Francis, Harrison, Hathaway & Co., Drapers, Messrs. Whiteaway, Laidlaw & Co., who are, I believe, primarily drapers, but do business in may other ways. It also includes one gentleman connected with a gramophone company and one with the Remington Typewriter Company, the Superintendent of the Bengal Stone Company who has recently supervised the construction of such buildings as the Army and Navy Stores, the Bengal Club, the office of Military Department and the addition to the High Court, the Accountant of Messrs. Balmer Lawrie, and the Manager of the Printing Works of the *Statesman*. I refer to the occupations of the ten witnesses, because there can be no doubt that they are in a position to speak with very great authority as to how much light is required for carrying on the business of a shop in the premises in question, and I may say of all of them that as far as I can judge they gave their evidence independently and with every desire to be fair between the parties. Summarising their evidence, I think it comes to this. The bottom and middle floors are useful for show-rooms of shops in front with other necessary rooms, such as work rooms and office rooms behind ; or for business offices which want less light. For these purposes they have now sufficient light, though the ground floor front room, *i.e.*, No. 2, has not enough light for the show-room of a jewellery shop, but that it probably never had owing to faulty design. Room No. 3 on the ground floor, that which would seem from the plans to have suffered most from the defendant's building, is still light enough for a tailor to distinguish patterns or for a printer to distinguish type, these both being of the most difficult kind to distinguish that are commonly used. Three witnesses, Mr. Deacon, of Hall and Anderson, Mr. Muir, of the Gramophone Company, and Mr. Stockwell, now of the Remington Typewriter Company, but formerly Secretary of the Young Men's Christian Association, had used the premises formerly, and said the light was generally as good as before. Some of these witnesses have admitted that the ground and middle floors would be more valuable if they were better lit. These are Mr. Emerson, Mr. Turnbull and Mr. Watson. The proposition that they would be more pleasant or convenient seems to me in this case to be nearly self-evident, and I incline to think that this is all that the witnesses meant. At any rate, Messrs. Emerson and Watson said that they would not feel inclined to pay for more light than there is.

The result of this evidence is that as far as the ground and middle floors of the plaintiffs' premises are concerned, I find that a sufficient quantity of the light which the plaintiff formerly enjoyed, is left for the purposes of carrying on the business of a shop or a business office there.

This finding disposes of the most contentious part of the case, and I may say that I have come to it after some doubt ; for on a consideration of the models and plans I cannot but consider that the plaintiffs' windows must have been greatly obscured, and the angle at which direct light reaches them is plainly something very small indeed. But in point of law this case is governed by what I take to be the rule that light coming to the plaintiffs' premises from other sources is to be taken into account ; and in point of fact, after hearing the evidence of the defendants' witnesses whom I have referred to, I suppose that if left to form my opinion by myself I should very much have underestimated the amount of light coming from the south.

The top floor of the plaintiffs' premises has throughout the case been treated as suited for residential purposes, and such evidence as we have on the matter seems to support this point of view. In view of Mr. Mackinnon's plans and the very small angle of direct light that the rooms on this floor now enjoy, I should by myself have been inclined to suppose that enough light was not left for ordinary purposes of inhabitancy. Mr. Esch, however, does not do more than put into words what Mr. Mackinnon's and his own diagrams show ; Mr. Mackinnon describes all the rooms as well lit, except No. 7, which is a bath-room, but does not mention the top floor as any part of the house that was permanently injured. Sir William Emerson says nothing specific about it. Several of the defendants' witnesses who have spoken on the subject have described this floor as a comfortable and well lit residence. Under these circumstances it is impossible that I should find that any nuisance has been caused there.

As regards the other windows in respect of which the plaintiff has brought forward a claim, *i.e.*, Nos. 19—27, I need not say much. Nos. 19, 20, and 23 seem actually to have been improved by the defendants' building operations, as a portico that formerly almost touched them has been removed : besides which, room No. 5, with windows Nos. 20 and 23 of the plaintiffs' middle floor, seems nearly uninhabitable and never to have been used. Window No. 21 is a window in room No. 7 on the top floor, as to which, as also the room on the roof with window No. 22, there is really no evidence. Windows Nos. 24, 25, and 26 belong to a kitchen and godown. They are no doubt accessible to much less light than before ; the rooms they belong to, Nos. 6 and 7 on the middle floor, now get most of their light through their doors, and their doors open on a space that by reason of the defendants' buildings is darker than before.

1911

PAUL v. ROBSON.

But I have no evidence on which I can find that a nuisance has been caused on this part of the plaintiff's premises, as this part of the case has been comparatively neglected as was not in fact worth much attention.

I, therefore, hold that the plaintiff has not proved that the defendant has prevented the access of light to his premises to a greater extent than he had a right to."

On the question of the infringement of the access of air, Stephen J. observed :—

"I have to decide whether the obstruction to the free access of air which has undoubtedly taken place amounts to a nuisance. What ought to be the most important evidence on this part of the case comes from Colonel Pilgrim and Major Calvert, but I regret to find that these gentlemen, so far as they have attended to the question at all, are at variance with one another,—the former asserting, the latter denying, that the defendants' buildings have seriously injured the ventilation of the plaintiffs' buildings. I cannot therefore consider that the medical evidence on this point is of any use to me. Turning, however, to the evidence of other witnesses who seem to me to have approached the case with more independence and dealt with it with a greater sense of responsibility than was shown by the doctors, I find that the evidence is all in the defendants' favour and goes to show that the plaintiffs' premises are not ill-ventilated. The question of ventilation was not pressed as much as the question of light, but on the evidence as it stands, I find that the plaintiff has failed to prove the creation of a nuisance as far as the obstruction to air is concerned, and that in this respect therefore the plaintiff has failed to make out his case."

With reference to the letting and selling value of the plaintiffs' premises, Stephen J. remarked :—

"There is a little evidence as to the letting value of the premises which favours the defendants' case. From 1903 to 1908 the premises were let to the Gramophone Company, apparently for five years at Rs. 715 a month, with option to renew at Rs. 780, the rent included the owners' and occupiers' shares of taxes which came to Rs. 90 together ; the landlord agreed to put in electric lights and fans. On the 5th September 1910, long after this suit was commenced, the *Empire* Newspaper Company offered after some negotiation to pay Rs. 850 a month for five years with an option of renewal at Rs. 900 : this offer seems to have been made on the understanding that the payment of Rs. 60 a month for occupiers' taxes would be taken as a part payment of Rs. 850 rent, whereas the plaintiff intended the contrary. The offer accordingly came to nothing

on this point as well as another, but there seems to be no doubt that the offer was a genuine one, and the plaintiff said candidly that had the Company offered to pay their share of the taxes, he would have accepted their offer. This offer was subject to some alterations, not apparently very serious ones, being made on the premises. This seems to show that the letting value of the plaintiffs' premises has not been diminished by the defendants' building operations : but there is no precise evidence as to what it would have cost the plaintiff to put in lights and fans in the one case or what it would have cost him to make the required alterations in the other. There is evidence also that all rents in that locality have risen since 1903, when the Gramophone Company took the premises. The evidence as to letting value is thus not conclusive ; but as far as it goes, it certainly favours the defendants' case. There is evidence of other offers made in respect of the premises, but of too vague a character to be relied on. I may add that I am unable to accept Mr. Martyrose's evidence on the question of either the letting or selling value of the property."

On the 29th March 1911 Stephen J. found that there had been no actionable nuisance, and dismissed the suit. On the questions of law raised his Lordship observed :—

"It is admitted that the law to be applied to this case as far as light is concerned is contained principally in the five judgments in *Colls* v. *Home and Colonial Stores* (1), summarized as it is in *Higgins* v. *Betts* (2) and further elucidated by its application to other facts in *Kine* v. *Jolly* (3). The authority of *Colls* v. *Home and Colonial Stores* (1) needs no discussion ; but it is a matter of more than mere curiosity, that it reasserts a principle laid down in this Court by Peacock, C. J., in *Bagram* v. *Khettranath Karformah* (4) which has been twice followed in this Court : see *Modhoosoodun Dey* v. *Bissonauth Dey* (5), and *Delhi and London Bank* v. *Hem Lall Dutt* (6).

The rules to be derived from these authorities, and which I consider to be applicable to the present case, are as follows :—The owner . . . . . of the dominant tenement is entitled to the uninterrupted access through his ancient windows of a quantity of light, the measure of which is what is required for the ordinary purposes of inhabitancy or business of the tenement according to the ordinary notions of mankind, etc. . . . . The single question in these cases is still what it was in the days of Lord

(1) [1904] A. C. 179.
(2) [1905] 2 Ch. 210.
(3) [1905] 1 Ch. 480.
(4) (1869) 3 B. L. R. (O. C.) 18.
(5) (1875) 15 B. L. R. 361.
(6) (1887) I. L. R. 14 Calc. 839.

1911

PAUL v. ROBSON.

Hardwicke and Lord Eldon,—whether the obstruction complained of is a nuisance." This passage occurs in Lord Davey's judgment in *Colls' Case* (1).

This rule supplies a test for the proper application of which two matters at least must be considered. One is the surroundings of the house, *e.g.*, whether it is in the town or the country, and the other is whether the dominant tenement derives light from other sources than the windows in question. I deduce the rule as to those matters from Lord Halsbury's judgment in *Colls' Case* (1) and the judgment of Romer, L. J., in *Kine* v. *Jolly* (2). As to the consideration to be paid to the surroundings of the house there can be no question. The question whether in deciding the question of nuisance or no nuisance, I can take into consideration the fact that the dominant tenement derives light from other sources has been contested with some vigour. But looking at the language of Lord Halsbury in the passage I have referred to (where I think that the words "is that it" must have dropped out after the words "the value of the test"), and at what is said by Vaughan Williams L. J. and Romer L. J. in *Kine* v. *Jolly* (2), I consider myself bound to hold that as long as the dominant tenement has sufficient light coming through ancient windows to satisfy the test described by Lord Davey, that is to say, to prevent a nuisance from being caused, no right of action arises on one or more ancient windows being obscured. It is to be observed that throughout all the judgments in *Colls' Case* (1) the question in issue is treated as being rather too much light does or does not come to the premises than too much does or does not come to the windows.

A question has been raised as to what constitutes the nuisance referred to in the latter part of the passage I have quoted from Lord Davey. I consider that the mention of the nuisance adds nothing to what goes before : and that the nuisance referred to is merely a diminution of the amount of light which is required for the ordinary purposes of inhabitancy or business of the tenement according to the ordinary notions of mankind. This view is consistent with the other judgments in the case, and it is specifically adopted by Farwell J. in *Higgins* v. *Betts* (3). In *Kine* v. *Jolly* (2), however, Vaughan Williams L. J. upheld the decision of the Lower Court that when a room which had ample light for all the purposes likely to be carried out in it, was by an obstruction of the light coming to it changed into a room where there was a bare sufficiency of light for its occupation for the purpose designed, an action lay ; but he was careful to say that there was a finding that according to the ordinary notions of

(1) [1904] A. C. 179, 185. (2) [1905] 1 Ch. 480, 497.
(3) [1905] 2 Ch. 210.

mankind the house had been substantially made less comfortable and less convenient. Romer L. J. in a dissenting judgment took a contrary view. Cozens Hardy L. J. agreed with Vaughan Williams L. J. and accepting the finding of the Lower Court that the letting and selling value of the house had diminished, and that though the room in question remained a well-lighted room, the comfort and convenience of its occupants had been materially affected, found that there was a cause of action. The judgment of the majority of the Court thus does lend itself to the construction that the question of the sufficiency of the light left is not the only matter to be considered: but I think it is also consistent with the passage I have quoted from Lord Davey's judgment, if due weight is to be given to the phrase "ordinary purposes of inhabitancy or business according to the ordinary notions of mankind." It is true that Cozens Hardy L. J. takes exception to the concluding words of the phrase, but Lord Davey used them, and if I may respectfully say so they appear to me to add nothing to the words "the ordinary purposes of inhabitancy" except as any explanatory illustration.

Much has been said in the case as also in the authorities I have quoted as to whether I am to consider how much light is left or how much has been taken away. The balance of authority seems to me to show that I am to consider the former question, and this is explicitly stated by Farwell J. in his summary of *Colls' Case* (1), in *Higgins* v. *Betts* (2). The other view is approved of by Lindley L. J. in *Colls' Case* (1) and by Cozens Hardy L. J. in *Kine* v. *Jolly* (3). I do not find it easy to reconcile these decisions. But I cannot understand, no doubt the fault is mine, the importance of the question. What is to be decided is whether the obstruction is a nuisance or not, and to do this we must consider the state of the dominant tenement, in other words, how much light is left. In fact, the question of how much light is taken away can only be stated in terms of how much light is left.

The law relating to light must, I think, be held to apply also to air as was pointed out in *Modhoosoodun Dey* v. *Bissonauth Dey* (4); the question of the sufficiency of air is more different in this country from the question of the sufficiency of light than it is in England, but both that case and *Bagram* v. *Khettranath Karformah* (5) are authorities for the proposition that the same law applies to both, and that view was taken in *Delhi and London Bank* v. *Hem Lall Dutt* (6), which like the first mentioned, but unlike the second mentioned case, was decided after the passing of the Limitation Act of 1871.

(1) [1904] A. C. 179.
(2) [1905] 2 Ch. 210.
(3) [1905] 1 Ch. 480.
(4) (1875) 15 B. L. R. 361.
(5) (1869) 3 B. L. R. (O. C.) 18.
(6) (1887) I. L. R. 14 Calc. 839.

1911

PAUL
v.
ROBSON.

It has been suggested that the middle floor room No. 1 was once divided as are the ground floor and the top floor ; and the position of the pillars in room No. 1 on the middle floor are relied on to show this. The importance of this is, that if on the middle floor there was a room like No. 3 on the ground floor, it would be darker than is the corresponding part of room No. 1. I suppose this would be so : but on my findings this is immaterial. I have however refused to consider the house as in any way different from what the plans show it to have been at the time the suit was brought. There is evidence that room No. 1 on the middle floor has been divided in different ways at different times, but there is no evidence that it was ever permanently divided up and such evidence would be necessary as well as evidence of when it was last so divided in order for the plaintiff to find any basis for his argument. Mr. Esch has described various contingencies depending on alterations of the internal arrangement of the house which might make it desirable that more light should come through some of the eastern windows than comes at present ; but this is irrelevant to the issue I have to decide, as the owner of the dominant tenement cannot increase the burden borne by the survient tenement by any act of his, apart from prescription."

In concluding, Stephen J. observed :—

"In the view I take of the question of whether an infringement of the plaintiff's rights has taken place, it is not necessary for me to decide some questions on which a good deal of evidence has been given, such as whether the plaintiff made such delay in asserting his rights as to disentitle him to a mandatory injunction, or whether the building of the tower at the south-west corner of the defendant's premises was an act of disobedience to the injunction of this Court.

The result of my findings is that I find in favour of the defendants and dismiss the suit with costs on scale No. 2."

From this judgment the plaintiffs appealed.

Mr. Pugh (*Mr. R. C. Bonneriee* with him), for the appellants. The true test as to whether the interference amounts to a nuisance or not is to consider what amount of light and air has been taken away and not what amount is left. The decision of Farwell J. in *Higgins* v. *Betts* (1) is opposed to the view taken by the House of Lords. Stephen J. has followed *Higgins* v. *Betts* (1), and while considering *Kine* v.

(1) [1905] 2 Ch. 210.

Jolly(1), has not considered *Jolly* v. *Kine*(2). Nuisance implies comparison with previous enjoyment. To avoid an actionable nuisance the present enjoyment must be as beneficial as before. Stephen J. has found that the light has been very materially obstructed, and that the whole of the direct light has been cut off. Reflected light cannot be taken into consideration: *Anath Nath Deb* v. *Galstaun* (3). An angle of considerably less than 45° has been left. This is conclusive evidence of a nuisance. It is only when the plaintiff claims more than 45° that he is to be called upon to prove a nuisance. In none of the reported cases from the *Fishmongers'* case (4) down to *Colls' Case* (5) and *Kine* v. *Jolly* (1), where the action for infringement has been dismissed, was the angle left less than 45°. Other sources of light can be taken into consideration only when an angle of 45° has been left. Otherwise the appalling proposition would follow that one side of a house can be absolutely blocked up by a neighbour without any remedy, so long as there is sufficient light from other sources. The plaintiffs are entitled to consider the effect of the obstruction on the light and air coming to the room on the first floor, on the hypothesis that the partitions that previously existed there were now replaced. User of the building is immaterial: the rights of the dominant tenement can be neither increased by user nor diminished by non-user. The appellants do not desire a reference on the question of damages. The south-western tower must in any event be ordered to be demolished. It was built in defiance of the order of the Court of the 25th February 1910: and the only remedy would be by a mandatory injunction:

(1) [1905] 1 Ch. 480.
(2) [1907] A. C. 1.
(3) (1908) I. L. R. 35 Calc. 661.
(4) (1752) 1 Dick. 163.
(5) [1904] A. C. 179.

1911

PAUL v. ROBSON.

Ecclesiastical Commissioners v. *Commissioners of Sewers of the City of London* (1), *Parker* v. *First Avenue Hotel Company* (2), and *Spokes* v. *Banbury Board of Health* (3). As regards the fifth storey of the defendant's building, the suit is undefended.

[The remedy by way of injunction as regards the main building was not pressed for].

Mr. B. C. Mitter (*Mr. Buckland and Mr. Camell* with him) for the respondents. The test laid down by the authorities, both Indian and English, as to whether the infringement of light and air amounts to an actionable nuisance or not, is whether there is a sufficient amount of light and air left for the ordinary purposes of inhabitancy or business of the building, taking into the consideration the locality where the building stands: *Bagram* v. *Khettra Nath Karformah* (4), *Modhoosoodun Dey* v. *Bissonauth Dey* (5), *Delhi & London Bank* v. *Hem Lall Dutt* (6), *Colls* v. *Home & Colonial Stores*, (7), *Higgins* v. *Betts* (8), *City of London Brewery Co.* v. *Tennant* (9), *Clarke* v. *Clark* (10). So long as there is sufficient light and air left according to the above standard, the past history of the building is immaterial. The Courts have never considered the infringement of the angle of 45° as *ipso facto* amounting to a nuisance. No damage in letting and selling value has been proved: if, however, the Court considers a *prima facie* case of nuisance has been made, the respondents are willing that there should be a reference as to damage, costs being reserved. Respondents are also willing to purchase the appellants' property

(1) (1880) L. R. 14 Ch. D. 305.
(2) (1883) L. R. 24 Ch. D. 282.
(3) (1865) L. R. 1 Eq. 42.
(4) (1869) 3 B. L. R. (O. C.) 18.
(5) (1875) 15 B. L. R. 361.
(6) (1887) I. L. R. 14 Calc. 839.
(7) [1904] A. C. 179.
(8) [1905] 2 Ch. 210.
(9) (1873) L. R. 9 Ch. Ap. 212.
(10) (1865) L. R. 1 Ch. Ap. 16.

for the price which Mr. Martyrose has said the property would have obtained if the building operations had not taken place. As regards the south-western tower, the infringement is negligible, and there is no rule of law that an order for demolition should ensue; the order for an injunction is discretionary, *Aynsley* v. *Glover* (1), and in the circumstances of this case, the order should not be made.

Mr. Pugh, in reply.

Cur. adv. vult.

JENKINS C.J. This appeal arises out of a suit in which the plaintiffs allege interference with the access of light and air to the windows of premises known as No. 7, Esplanade East in the town of Calcutta, and claim relief by way of injunction and damages.

This interferenee is said to have been occasioned by the erection of a five-storied building on the site of No. 8, Esplanade East, where there had previously stood, in the front part, a one-storied building, and, in the back part, a two-storied building. Nos. 7 and 8 Esplanade Road have a southern aspect and face the maidan, No. 8 being to the East of No. 7.

The plaintiffs have successive life interests in No. 7 under a marriage settlement, of which the fifth defendant, Mr. McNair, is one of the trustees, and he is made a defendant, because he declined to join as a plaintiff. The first four defendants are members of a well known firm of builders and architects, who carry on business under the name and style of Mackintosh Burn & Co.: they are the owners of No. 8, Esplanade East, and have erected the building of which complaint is made. The windows alleged to

(1) (1874) L. R. 18 Eq. 544.

1911

PAUL v. ROBSON.

JENKINS C.J.

have been darkened are admittedly ancient, and it is not disputed that the plaintiffs have an easement for the access of light and air to them.

The erection of the defendants' building led to the institution of this suit on the 4th of February 1910.

The suit was heard by Stephen J., who dismissed it with costs, and from his judgment the present appeal has been preferred.

Apart from legislation, the English law which prevailed before the Prescription Act, 2 and 3 Will. IV, C. 71, is that to which we must look for the rules governing the right to light. Though the Indian Statute Book contains an easement Act which defines the law of easements, it has no application to Bengal: here the only legislation as to easements is to be found in Part IV of the Indian Limitation Act. That part is headed, "Acquisition of ownership by possession," and the sections in it prescribe a mode of acquiring ownership by possession or enjoyment. *Rajrup Koer* v. *Abul Hossein* (1). Section 26, the first section in that part, deals with "Acquisition of right to Easements," and provides that, where the access and use of light and air to and for any building have been peaceably enjoyed therewith as an easement, and as of right, without interruption and for 20 years, the right to such access and use of light or air shall be absolute and indefeasible. This section is concerned only with the acquisition of the easement, and does not purport to measure the extent of the right, or to indicate the remedy by which a disturbance of the right is to be vindicated: for that recourse must be had to the English law as it stood before the Prescription Act. The extent of the right, in the absence of express stipulation, hardly admits of precise measurement; but the point at which its invasion becomes

(1) (1880) I. L. R. 6 Calc. 394, 402.

actionable in concrete cases is capable of description, and that description is one which is indicated by the remedy by which the right can be vindicated. That remedy is a suit not for trespass, but for nuisance, and "Nuisance," it is said, "is where any man raises any wall or stops any water or doth anything on his own ground to the unlawful hurt or annoyance of his neighbour. It may also be by stopping lights in a house or causing water to run over house or lands for remedy whereof an action upon the case or assize lyeth." (*Termes de la Ley.*)

What amounts to a nuisance must largely be a question of fact to be determined by reference to the circumstances of each case, the test being that there has been a sensible abridgment of the plaintiff's right resulting in loss to him. Where the alleged nuisance is an interference with an easement of light or air to a house, that is unoccupied but suitable for residence and business purposes, it must be shewn that there has been a sensible privation of light sufficient to render the occupation of the house uncomfortable and to a sensible degree less fit for the purposes of business.

There has been much discussion before us as to whether, in investigating the alleged nuisance, regard is to be had to the state of things before the interference or not, and it has been contended that, on this point, there is a conflict of view between Lord Macnaghten and Lord Lindley, on the one hand, and Lord Davey, on the other, in *Colls* v. *Home and Colonial Stores* (1). And this conflict, it is suggested, has become more marked and irreconciliable by the adherence of Cozens Hardy L. J. to the one [*Kine* v. *Jolly* (2)], and of Farwell, J. to the other view

(1) [1904] A. C. 179.

(2) [1905] 1 Ch. 480, 503.

1911

PAUL v. ROBSON.

JENKINS C.J.

[*Higgins* v. *Betts* (1)]. I doubt whether there is any real conflict: and it appears to me that the difference of expression on which the argument rests may be fairly referred to the difference in the facts or conditions under review, and the considerations that particularly engaged the attention of those by whom these divergent expressions were severally used. No one, I imagine, would suggest that in a suit for disturbance of light the character of the previous enjoyment could be wholly disregarded: nuisance implies comparison, and the previous state of affairs is a necessary standard for that comparison. In every case, therefore, that comes before the Court the previous enjoyment is proved or sought to be proved, and it is an element which must, from the nature of things, be present in the mind of the Court.

But that is a very different thing from saying that the previous enjoyment furnishes the decisive measure of the "unlawful hurt or annoyance." Even *Higgins* v. *Betts* (1), on which reliance has been principally placed, recognises the materiality of the prior enjoyment for the ultimate finding of the learned Judge, which must have embodied what he regarded as the true test, is that the rooms in question "were materially affected and injured, and that there was a substantial deprivation of light sufficient to render the occupation of the house uncomfortable, and to prevent the plaintiff carrying on his accustomed business (that of a licensed victualler) on the premises as beneficially *as he had done before*." The fact is that what has to be determined in each case is whether, having regard to all the surrounding circumstances, a nuisance has been proved. In arriving at this conclusion I cannot perceive that I am in any way deviating from what was decided in *Bagram* v. *Khettranath*

(1) [1905] 2 Ch. 210.

Karformah (1), *Modhoosoodun Dey* v. *Bissonauth Dey* (2), or *Delhi and London Bank* v. *Hem Lall Dutt* (3). What then are the material circumstances in this case by reference to which we have to determine whether there has been such an interference with the plaintiff's easements of light as amounts to a nuisance?

[His Lordship then, having discussed the evidence in the case, continued as follows:]

Now, one cannot read this evidence without feeling that the defendants' building operations have not darkened the plaintiffs' premises to the extent that might have been expected. The principal explanation of this is that the plaintiffs have the advantage of a considerable quantity of light from other sources, and in particular from the south and the west. Are then the defendants entitled to rely on this for the purpose of establishing that, notwithstanding their newly erected building, the plaintiffs' premises are not uncomfortable and not less fit for business purposes?

Comfort and fitness are conditions that must depend on existing facts and regard must be had to the state of things as they exist for the purpose of determining whether a nuisance in fact has been proved. But this must be taken subject to one qualification: the opinion has been expressed by Lord Lindley in *Colls* v. *Home and Colonial Stores, Limited* (4), by Lord Atkinson in *Jolly* v. *Kine* (5), and by Romer L. J., in *Kine* v. *Jolly* (6), that light from other sources to which a right has not been acquired by grant or prescription, and of which the plaintiffs may be deprived at any time ought not to be taken into account. Whatever the difficulties this opinion

(1) (1869) 3 B. L. R. (O. C.) 18.
(2) (1875) 15 B. L. R. 361.
(3) (1887) I. L. R. 14 Calc. 839.
(4) [1904] A. C. 179, 201.
(5) [1907] A. C. 1, 7.
(6) [1905] 1 Ch. 480, 497.

1911

PAUL v. ROBSON.

JENKINS C.J.

may involve, I think I ought to regard it as at present conclusive.

We have been told that the case was discussed before Stephen J. on the common assumption that the plaintiffs in this case could not be deprived of the light from other sources on which the defendants rely. There are indications that that is so, and I feel no doubt that the representation made to us is correct.

I, therefore, propose to deal with this appeal on that footing, and at the same time I have the satisfaction of feeling that this assumption is probably in accordance with the fact. What then does the evidence in this case show? We have gone carefully through it, and it has been subjected to much critical comment on both sides, with the result of establishing the correctness of the learned Judge's estimate of the weight due to the evidence of certain witnesses called by the defendants for the purpose of showing that what has been done does not constitute an actionable nuisance. The witnesses to whom I refer are those several gentlemen who are engaged in business in Calcutta, and more particularly Mr. Muir, Mr. Stockwell, Mr. Deacon and Mr. Hardy. I select these four witnesses for special mention as they, from previous business connection with the premises, are pre-eminently qualified to depose to the effect of the defendants' building.

To Stephen J. it seemed that these witnesses gave their evidence independently and with every desire to be fair between the parties. This is quite as I should have expected.

Agreeing as I do with the learned Judge's estimate of their evidence, I do not think it necessary to discuss it in detail; it will be sufficient that I should express my conclusion. I find, then that, though there is an abridgment of direct light from the east, there

still remains a sufficiency of light for the ordinary purposes of this house, and that, even the diminution of light to the rooms Nos. 2 and 3 on the ground flour to which windows Nos. 10, 13, and 16 belong, does not to such a material extent detract from the value of those rooms considered as an integral part of the plaintiffs' premises, as materially to affect the suitableness of those premises for the purposes for which they may reasonably be regarded as available.

Though the argument before us has practically been limited to a discussion of the easement of light, complaint is also made of the interference with the access of air to the plaintiffs' premises, but as to this part also of their case the plaintiffs have failed to establish an actionable nuisance.

The result then is that I hold that the plaintiffs have not proved that their premises have been materially affected or injured, or that there has been a sensible deprivation of light and air, sufficient to render the occupation of the premises uncomfortable, or to prevent their being used for purposes of business as beneficially as before.

Further than this, I hold that the plaintiffs have failed to prove that the selling or letting value of the premises has been diminished : in fact, the indications are, if anything, the other way. I do not forget Mr. Martyrose, but in view of the learned Judge's appreciation of his evidence, for which there seems to be very good reason, I certainly am not prepared to act on it. So confident are the defendants that no loss could be proved on the score of the diminution in the access of light and air to the plaintiffs' premises that they intimated their willingness that there should be a reference as to damage if the Court considered a *primâ facie* case of nuisance had been made out, and they intimated this willingness, though the Judge

1911

PAUL v. ROBSON.

JENKINS C.J.

expressly called on the plaintiffs to prove damages at the trial. After some consideration the plaintiffs rejected any proposal for a reference, and ultimately Mr. Pugh said, "I ask the Court to decide on the evidence and not to send the case to a Referee for ascertainment of damages." On this evidence I hold no damages have been proved.

I would point out, for what it may be worth, that the defendant firm have, in the course of the hearing before us, offered for the property a sum equal to the value placed by Mr. Martyrose on it, as it was before the erection of their building. This offer was refused. I do not suggest that this is in any way conclusive, but so far as it goes, it accords with my independent finding that no damage has been proved.

One or two points still remain to be considered as influencing the question of costs.

First, it is said that unless the suit had been brought, the defendants would have carried their building to an even greater height, and that would seem to be so. The result of the suit has been that the defendants have set back the top storey of their building so as not to affect the plaintiffs' easement. The defendants, however, expressed their willingness to make and retain this set-back at an early stage of the case, and on the 16th of February, the fifth day of the hearing, Mr. Buckland "offered not to reduce the set-back to less than six feet, which as admitted by Mr. Esch would not obstruct sky-light from the first floor any more than it is at present obstructed." This offer was not accepted. Before us Mr. Buckland has repeated this offer and expressed his willingness that it should be embodied in the decree in the form of an undertaking.

The utmost concession that can be made to the plaintiffs on this score is that each side should bear

its own costs of the suit up to the end of the 16th of February.

Then we were urged to regard the erection by the defendants of the tower at the south-west corner of their building as a breach of the *interim* injunction obtained from Fletcher J., and that we should now direct its removal.

The evidence convinces me that this tower does not materially affect the plaintiffs' right, and having regard to the circumstances that led to its erection, it would be wrong for us to accede to the plaintiffs' request.

The result then is that in my opinion the judgment of Stephen J. dismissing the suit should be upheld. There will, however, be embodied in the decree an undertaking by the defendants not to reduce the set-back on the top storey of the premises to less than 6 feet from the western wall.

We direct that each side will bear its costs of the suit up to and including the 16th of February, except as otherwise specifically ordered, and subject to that the plaintiffs must bear the defendants' costs of the suit.

The defendants must get the costs of the appeal.

WOODROFFE J. I agree.

Appeal dismissed.

Attorneys for the appellants: *Orr, Dignam & Co.*
Attorneys for the respondent: *Watkins & Co.*

J. C.

CRIMINAL REVISION.

Before Mr. Justice Holmwood and Mr. Justice N. R. Chatterjea.

1911

Aug. 3.

TRIPENDESWAR MITTER

v.

CORPORATION OF CALCUTTA.*

Building—"Re-erection"—Renewing or repairing a roof replaced on its former site—Reconstruction not exceeding one-half its cubical extent—"Building," whether a shed with posts and tin roof is a—Buliding line of a road, encroachment on—Calcutta Municipal Act (Beng. III of 1899), ss. 3(3), (39)(a), 351, 449.

The removal of an old roof of a shed consisting of posts and the replacing on the same site either of a new roof or the former one after repairs, without an alteration exceeding one half its cubical extent, is not a "re-erection" within s. 3 (*39*) (*a*) of the Calcutta Municipal Act.

The offence of infringing on a building line within the meaning of s. 351 is, having regard to the definition in s. 3 (*3*), the erection or re-erection of the wall of a building within that line, and not the removal of an old roof and replacing it on the same site.

THE petitioner had a timber yard at No. 61, Russa Road North, on which there was standing, before the building line of the road had been laid down, a shed consisting of four posts and a tin roof. In January 1911, after the line was prescribed, he took off the roof, and subsequently put up either a new tin roof or the old one repaired on the identical site of the former one, without any alteration in its dimensions or height, except a small one not exceeding one-half its cubical extent. The petitioner was prosecuted before the Municipal Magistrate for having re-erected a hut without sanction, for encroachment on the building line in contravention of s. 351 of the Act, and for

* Criminal Revision No. 797 of 1911, against the order of N. C. Ghattack, Municipal Magistrate of Calcutta, dated June 9, 1911.

not having kept an open space of six feet between the hut and the masonry building on the north. The Magistrate found these facts established, and held that a clear case of re-erection under s. 449 (*1*) (*c*) of the Act had been made out. He accordingly, by his order, dated the 9th June 1911, directed that so much of the hut, re-erected without sanction, be demolished, at the petitioner's expense by the Chairman, as would remove the same from the prescribed building line or leave six feet of open space between it and the masonry building on the north. The petitioner, thereupon, moved the High Court and obtained the present Rule.

Babu Provas Chunder Mitter and *Babu Susil Madhab Mullick*, for the petitioner.

Babu Debendra Chunder Mullick, for the opposite party.

HOLMWOOD AND N. R. CHATTERJEA, JJ. This conviction is for re-erecting a building within the building line of a certain road. It appears that before the building line was laid down, the shed consisting of four posts and a tin roof stood in identically the same spot as it does now. After the building line was laid down, the owner had occasion to take the roof off, and the municipal authorities happened to see this place when there was no roof on the shed. Whether the owner repaired the same bits of tin, or whether he put in new bits of tin, or what he did in renewing or repairing his roof, there is nothing to show. But he eventually put up a roof either made of new tin or repaired, it does not matter which, in identically the same place as the old roof.

Now, this is certainly not a "re-erection." It is admitted that section 3 (*39*) (*a*) is the only definition

1911

TRIPENDESWAR MITTER v. CORPORATION OF CALCUTTA.

which can apply in this case, and this is reconstruction of the building if more than one-half of the cubical contents has been taken down. Now, the removal of this roof for the purpose of repairing did not alter the cubical contents of this shed in the least, except a small area which the lean-to roof may have contained. That certainly cannot have been anything like one-half or even a quarter of the whole cubical contents. The expression "re-erected" does not apply.

Now comes the question whether section 351 has been infringed. "No portion of any building or wall abutting on a public street shall be constructed within the line." We cannot find any definition of the word "building," and we are not at all clear that this roof with four posts is a "building," but from the use of the expression "wall abutting on a public street," we presume that the offence intended was one which is indicated in section 3 (*3*) of the Act where the "building line" is defined as meaning "a line (in rear of the street alignment) up to which the main wall of a building abutting on a street may lawfully extend." It is, therefore, clear that the offence of infringing on a building line is the erection or re-erection of the wall of a building within that line, and we do not think that the replacing of the roof upon the same posts can fall within the purview of the law. Admittedly it is the front posts and not the roof which caused the trouble, and if the Municipality wish to remove the obstruction, they must obtain powers obviously to remove the posts, because the roof cannot be removed unless the posts are removed, and the posts appear to have been always in the same position as they are now. The Rule must, therefore, be made absolute, and the order of the lower Court discharged.

E. H. M.

Rule absolute.

APPELLATE CIVIL.

Before Mr. Justice Mookerjee and Mr. Justice Caspersz.

DINESH CHANDRA ROY CHOWDHURY

v.

BIRAJ KAMINI DASEE.*

1911

May. 16.

Hindu Law—Will—Gift to future wife of son of testator, she being in existence at the time of the testator's death, whether valid—Succession Act (X of 1865), s. 99, effect of —Hindu Wills Act (XXI of 1870), s. 3, how far controls principles of Hindu Law.

Section 99 of the Indian Succession Act does not apply to the will of a Hindu and invalidate provisions made in accordance with the principles of Hindu Law.

A bequest made by a father to the would-be wife of his son may be deemed a bequest to a person, described as standing in a particular degree of kindred to his son within the meaning of the exception to section 99 of the said Act.

Although by section 3 of the Hindu Wills Act the provisions of section 99 of the Indian Succession Act was made applicable to the Hindus, the intention of the Legislature was to leave unaffected the rules of Hindu Law.

According to the principles of Hindu Law, a bequest made by a person to his son's would-be wife, who was in existence at the time of the testator's death, is valid, notwithstanding the provisions of section 99 of the Indian Succession Act.

SECOND APPEAL by Dinesh Chandra Roy Chowdhury, the defendant No. 1.

This appeal arose out of a suit for recovery of possession of immovable property on declaration of plaintiff's title thereto. The plaintiffs alleged that their predecessor, late Navadwip Chandra Sarkar, owned and held for upwards of 12 years in *kaemi jote* right under the former proprietors of the 16-annas of the

* Appeal from Appellate Decree, No. 596 of 1908, against the decree of Pran Krishna Biswas, Subordinate Judge of Dacca, dated Nov. 30, 1907, confirming the decree of Atul Chandra Banerjee, Munsif of Manikgunj, dated Sept. 3, 1906.

1911

DINESH CHANDRA ROY CHOWDHURY v. BIRAJ KAMINI DASEE.

taluk, Kismat Jote Malshi. The said Navadwip Chandra died leaving a will in which he made the following provisions:

"That after his death, his son, Girish Chandra Sarkar's wife, the plaintiff No. 1, would receive a 4-annas share of the property left by him, the wife of his another son, Bhagoban Chandra Sarkar, when married, would receive a 4-annas, the wife of his another son, Harish Chandra Sarkar, when married, would receive another 4-anna share, and his grandsons, the plaintiffs Nos. 4 and 5, the remaining 4 annas in equal shares."

After the death of Navadwip Chandra Sarkar, Bhagwan Chandra Sirkar married Ganoda Sundari Dassi, and Haris Chandra Sarkar married Kuloda Sundari Dassi. Subsequently Ganoda Sundari died leaving the plaintiff No. 2 as her son and heir, and Kuloda Sundari died leaving the plaintiff No. 3 as her son and heir. The plaintiffs further alleged that they were in possession of the disputed properties up till the 12th of April 1897, by receipt of rent collected on their behalf by the executors of the estate from the tenant defendants; that on the release of the estate in favour of the plaintiff by the executors, defendant No. 1 induced the other defendants to withhold payment of rent on the allegation that the disputed lands were included within his zemindary. Hence the present suit was brought by the wife of Girish Chandra, the sons of Ganoda Sundari and Kuloda Sundari and the two grandsons of Navadwip Sarkar.

It appeared that the two ladies, Ganoda Sundari and Kuloda Sundari, were in existence at the time of the testator's death.

Defence, *inter alia*, was that the plaintiffs had no title to the disputed lands, and that in any event they had acquired no valid title under the will left by Navadwip Chandra Sarkar, deceased.

The Court of first instance, having held that the disputed lands were part of the estate of Navadwip

Chandra Sarkar, decreed the suit. It did not express any opinion on the question of law whether the plaintiffs acquired a valid title under the will of the testator. On appeal, the learned Subordinate Judge, having affirmed the finding of fact arrived at by the Court of first instance and holding that the disposition was valid in law, dismissed the appeal.

Against this decision the defendant No. 1 appealed to the High Court.

Babu Basanta Kumar Bose and *Babu Bidhu Bhushan Ganguli*, for the appellant.

Babu Dwarka Nath Chuckerbutty and *Babu Ramani Mohan Chatterjee*, for the respondent.

Cur. adv. vult.

MOOKERJEE J. This is an appeal on behalf of the first defendant in an action for recovery of possession of landed property upon declaration of title, and for mesne profits for the period of dispossession. The case for the plaintiffs-respondents briefly stated is as follows. The subject-matter of the litigation belonged to their ancestor Navadwip Chandra Sarkar who made a testamentary disposition of his properties on the 22nd May 1889, and died four days later. The will provided that upon the death of the testator, one-fourth share of his landed property would pass to Biraj Kamini Dasi, the wife of his eldest son, Girish Chandra Sarkar. Another one-fourth share would be taken by Radha Ballav Sarkar and Jagat Ballav Sarkar, his grandsons by his predeceased son, Govinda Chandra Sarkar. The remaining half share would pass to the wives of his sons Bhagaban Chandra Sarkar and Harish Chandra Sarkar immediately upon their marriage, and so long as these sons would not marry, his youngest son Harish Chandra Sarkar alone

1911

DINESH CHANDRA ROY CHOWDHURY v. BIRAJ KAMINI DASEE.

MOOKERJEE J.

would enjoy the proceeds of the said half share and hold possession thereof. At the time of the death of the testator, Bhagaban Chandra and Harish Chandra were both unmarried. They were married, however, in 1892, to two ladies by name Ganoda Sundari and Kuloda Sundari, respectively. Subsequently Ganoda Sundari died leaving an infant son, Dinesh Chandra: Kuloda Sundari died leaving an infant son, Ram Chandra. The plaintiffs assert that they were in possession of the disputed properties up till the 12th April 1897, by receipt of rent collected on their behalf by the executor to the estate from the tenants defendants, that is, the defendants other than the first defendant; that after the estate had been released by the executor in favour of the plaintiffs, the first defendant, an influential landlord, induced the other defendants to withhold payment of rent on the allegation that the lands were included in his zemindary: and that as a result of this combination amongst all the defendants, the plaintiffs have been dispossessed. The wife of Girish Chandra, the sons of Ganoda Sundari and Kuloda Sundari, and the sons of Govinda Chandra, therefore, commenced this action on the 19th January 1906, for declaration of title and recovery of possession and mesne profits. The defendants contested the claim on the grounds that the ancestor of the plaintiffs had no title to the disputed property, and that, in any event, the plaintiffs had acquired no valid title to any portion of his estate under his testamentary disposition.

The Courts below have concurrently found upon the question of fact, whether the disputed property was part of the estate of Navadip Chandra Sarkar, in favour of the plaintiffs: indeed, though the first defendant obtained repeated adjournments to produce evidence, and considerable indulgence was shown to

him, he did not adduce any evidence at all in support of his alleged title. Upon the question of law, namely, whether the plaintiffs had acquired a title under the testamentary disposition of their ancestor, the Court of first instance did not express any opinion, although it decreed the claim in full. The Subordinate Judge, however, has considered the question and held that the disposition was valid in law and operative to create a good title in the legatees. In this view, the decree of the Original Court has been affirmed by the Court of Appeal below. Upon the present appeal, the only question which has been argued is as to the validity of the testamentary disposition made by the testator.

It has not been disputed that there was a valid disposition in so far as an one-fourth share was given to the wife of the eldest son, Biraj Kamini, the first plaintiff in the suit, and also in respect of the other one-fourth share given to the grandsons of the testator, the fourth and fifth plaintiffs. But it has been argued that in so far as the second and third plaintiffs are concerned, who claim as the infant sons of their mothers, the wives of the two sons of the testator, Bhagaban Chandra and Harish Chandra, they have acquired no valid title as the disposition in favour of the wives of the two sons was invalid in law, because contrary to the provisions of section 99 of the Indian Succession Act. It is worthy of remark that the objection in this form was neither specifically taken in the written statement, nor raised in the issues. It was undoubtedly not presented in this form in the Court of first instance. If it had been so taken, it would have been equivalent in substance to an objection that there was an intestacy as to this one-half share, subject to the gift of the income in favour of Harish Chandra, that is, that this

1911

DINESH CHANDRA ROY CHOWDHURY v. BIRAJ KAMINI DASEE.

MOOKERJEE J.

one-half share vested in interest in the sons and grandsons of the testator, subject to the gift of the intermediate income to Harish for his life. Two of these sons, including Harish, were acting as next friends to the second and third plaintiffs, and the two grandsons were themselves suing as plaintiffs. If, therefore, this specific objection had been taken, it is more than probable that the three sons of the testator might have applied to be added as parties plaintiffs, and thus completely met the objection of the defendants. As I have stated, however, the objection does not appear to have suggested itself to the defendants till the case was argued on appeal before the Subordinate Judge, who held, upon a construction of the will, that the testamentary disposition was valid and operative. The only question, therefore, which requires consideration in this Court, is whether there was a valid testamentary disposition in favour of the wives of the two sons of the testator, Bhagaban Chandra and Harish Chandra.

The learned vakil for the appellant has not disputed that the decision of this Court in *Nafar Chandra Kundu* v. *Ratnamala Debi* (1) is completely antagonistic to his contention. In that case, it was ruled that the general principle that a donee must be in existence for the validity of a gift is subject to an exception in the case of conditional gifts on marriages, so that a bequest in favour of a girl who was to be married by the testator's son, and who was in existence at the time of his death, is valid. In the case before us, the two ladies who were married to Bhagaban Chandra and Harish Chandra in 1892 had been born, so far as we can gather, before the death of the testator, which took place on the 26th May 1889. Under these circumstances, according to the principles

(1) (1910) 13 C. L. J. 85 ; 15 C. W. N. 66.

of Hindu law as explained in the case of *Nafar Chandra Kundu* v. *Ratnamala Debi* (1), the disposition may be sustained. The learned vakil for the appellant has, however, argued that as the disposition is contrary to the provisions of section 99 of the Indian Succession Act, which was made applicable to Hindus by section 3 of the Hindu Wills Act, it is invalid, notwithstanding any principles of Hindu law to the contrary. This position has been strenuously controverted by the learned vakil for the plaintiffs respondents, who has further argued that if section 99 of the Indian Succession Act be held to be applicable, the disposition is covered by the exception to that section, and must consequently be sustained. The argument addressed to us, on both sides, therefore, raises two questions of considerable importance, namely, *first*, whether section 99 of the Indian Succession Act applies to the will of a Hindu and invalidates provisions made in accord with the principles of Hindu Law : and, *secondly*, whether the exception to section 99 applies to a case of this description.

In so far as the first of these questions is concerned, the answer must depend upon the true construction of section 3 of the Hindu Wills Act, which provides that nothing contained in that Act shall authorize any Hindu to create in property any interest which he could not have created before the 1st September 1870. The learned vakil for the appellant has contended that this provision is unilateral and of a purely restrictive character: that is, while it provides that the power of testamentary disposition of a Hindu is not enlarged by the provisions of the Hindu Wills Act, that is, by the provisions of the Indian Succession Act incorporated therein, it does not provide that such powers are not curtailed by those provisions.

(1) (1910) 13 C. L. J. 85 ; 15 C. W. N. 66.

1911

DINESH CHANDRA ROY CHOWDHURY v. BIRAJ KAMINI DASEE.

MOOKERJEE J.

The question raised is one of some novelty and nicety, and it may be conceded that the view put forward by the appellant may be justified by a strict and literal construction of the language used by the Legislature in section 3 of the Hindu Wills Act. The learned vakil for the respondents has, however, argued that the true intention of the Legislature was to leave matters where they were before the enactment of the Hindu Wills Act: and in support of this view, he has relied upon the cases of *Alangamoniori Dabee* v. *Sonamoni Dabee* (1) on appeal, *Cally Nath Naugh* v. *Chunder Nath Naugh* (2), *Ram Lal* v. *Kanai Lal* (3), *Jai Ram* v. *Kuverbai* (4), and *Anand Rao* v. *Administrator-General of Bombay*(5). Our present inclination is in favour of the view put forward by the respondents which is supported by the history of the legislation on the subject.

The Hindu Wills Act, 1870, was passed before the Judicial Committee of the Privy Council had decided the case of *Jatindra Mohan Tagore* v. *Ganendra Mohane Tagore* (6), and finally laid down the doctrine that except possibly in certain exceptional cases, no interest could, by Hindu law, be created in favour of an unborn person. The true limits of the rules of the Hindu law on the subject were at the time matters of serious controversy, and under such circumstances, the Legislature appears to have thought that the safest course was to leave untouched the rules of Hindu law in this matter. A similar policy appears to have been pursued in the case of the Transfer of Property Act, where clause (*d*) of section 2 provides, in somewhat wider and less ambiguous

(1) (1882) I. L. R. 8 Calc. 637.
(2) (1882) I. L. R. 8 Calc. 378.
(3) (1886) I. L. R. 12 Calc. 663.
(4) (1885) I. L. R. 9 Bom. 491.
(5) (1895) I. L. R. 20 Bom. 450.
(6) (1872) 9 B. L. R. 377; L. R. I. A. Sup. Vol. 47.

language, that nothing in the second chapter of the Act shall be deemed to affect any rule of Hindu law. No doubt, as observed in *Bhabatarini Debya* v. *Peary Lal Sanyal* (1), there is a striking difference between the phraseology used in section 3 of the Hindu Wills Act and that used in section 2 of the Transfer of Property Act. It is difficult, however, to believe that different policies were adopted by the Legislature on the two occasions, and there is considerable force in the contention of the respondents that the true intention was to leave unaffected the rules of Hindu law. If this interpretation is adopted, no question arises as to the validity of the bequest in this case in view of the decision in *Nafar Chandra Kundu* v. *Ratnamala Debi* (2).

It is worthy of note that if the restricted construction put upon section 3 of the Hindu Wills Act by the learned vakil for the appellant were adopted, the result would be that in so far as the rule in section 99 restricts the power of testamentary disposition of a Hindu, it would be operative: but in so far as the exception to that rule enlarges the power of testamentary disposition, it would be inapplicable. In other words, in this view, the Legislature intended to impose a considerable hardship on Hindu testators, namely, to deprive them of the benefit of the rules of Hindu law on the subject and also of the benefit of the exception to the statutory rule in respect of this matter. It is difficult to hold that such could have been the intention of the Legislature; from this point of view, it appears more reasonable to hold that the rule and the exception ought to be read together, and if the rule applies, it does so only as qualified by the exception: but possibly the true intention was to make neither the rule nor the exception applicable to

(1) (1897) I. L. R. 24 Calc. 646, 650. (2) (1910) 13 C. L. J. 85.

1911

DINESH CHANDRA ROY CHOWDHURY v. BIRAJ KAMINI DASEE.

MOOKERJEE J.

Hindus. If we assume, however, for a moment, that section 99 is applicable, the question at once arises whether the case is not covered by the exception to that section. But before we deal with this question, it may be observed, that if section 99 is held applicable and the exception is not wide enough to cover the case, the bequest cannot be upheld. It could hardly be predicated of the mothers of the second and third plaintiffs that, although their marriage took place after the testator's death, they were persons in existence at the testator's death who answered the description: the section requires, not only that they must have been in existence at the testator's death, but they must also answer the description at the testator's death. Not having married before the testator's death it is manifest that they could not answer the description of wives of Bhagaban and Harish at the testator's death. The gift must vest at least in interest at the testator's death, and it could not so vest in persons who must be deemed *personæ incertæ* at the time.

The second question which requires consideration is whether the bequest falls within the exception to section 99. Here we may premise that it has not been seriously argued that the rule in section 99 applies to the case of a Hindu will, because it restricts the testamentary powers of a Hindu, while the exception to the Rule does not apply, because it enlarges the testamentary powers of a Hindu. The case has been argued before us on the assumption that if section 99 applies to the case of a Hindu will, both the rule and the exception thereto are applicable, and the only controversy is, whether the exception is comprehensive enough to cover the case before us. The exception is in these terms:

"If property is bequeathed to a person described as standing in a particular degree of kindred to a

specified individual, but his possession of it is deferred until a time later than the death of the testator by reason of a prior bequest or otherwise: and if a person answering the description is alive at the death of the testator, or comes into existence between that event and such later time, the property shall, at such later time, go to the person, or if he be dead, to his representatives."

It has been argued that here the bequest to the future wives of the sons of the testator was not a bequest to a person described as standing in a particular degree of kindred to a specified individual. This contention has been based on section 20 of the Indian Succession Act, where the term "kindred" is defined as follows:

"Kindred or consanguinity is the connection or relation of persons descended from the same stock or common ancestor."

With reference to this definition, it has been argued that the future wives of the sons could not be called "kindred" of their respective husbands, as they were not and could not, according to Hindu law, be descendants from the same stock or common ancestor. This contention is entirely fallacious: it overlooks the fundamental point that although section 99 is incorporated in the Hindu Wills Act, section 20 is not so incorporated, and we must take it, therefore, that this definition was not intended to be made applicable to Hindus. It is well known that the definition in question is based upon the principles of the English Statute of Distributions (Stat. 22 and 23, Charles II, Chapter 10), the substance of which was borrowed from the 118th Novel of Justinian (Kent's Commentaries, Vol. II, page 422: Institutes of Gaius and Justinian by Dr. Mears, Introduction, page 58, and text, page 593). Under the English law, it is well known, as stated by

1911

DINESH CHANDRA ROY CHOWDHURY v. BIRAJ KAMINI DASEE.

MOOKERJEE J.

Blackstone in his Commentaries (Vol. II, page 203) quoted in Williams on Executors (10th edition, Vol. I, page 329), that consanguinity or kindred is "*Vinculum personarum abeadem stipite descendentium*," the connection or relation of persons descended from the same stock or common ancestor: in other words, as Lord Coke observed in *Hensloe's Case*(1), the next-of-kin are those that are "next of blood who are not attainted of treason, felony, or have any other lawful disability," that is, the nearest blood relations of the *propositus* in an ascending and descending line: *Hatton* v. *Foster*(2) and *Harris* v. *Newton*(3). On this principle, it has been ruled that a gift to a next-of-kin under the English law does not include a husband or a wife: *Watt* v. *Watt* (4), *Garrick* v. *Lord Camden*(5), *In re Fitzgerald*(6), *and Milne* v. *Gilbert*(7). But the question arises, whether, in view of the fact that the Legislature has deliberately omitted to incorporate into the Hindu Wills Act the definition of the term "kindred" borrowed from the principles of English law and embodied in section 20 of the Indian Succession Act, it is necessary or desirable that the Court should place the same restricted interpretation upon the expression and hold that to constitute next-of-kin, there must be blood relationship between the two persons. It is useful to remember in this connection that Hindu wills, as a rule, should be interpreted by Hindu law alone, without any mixture of laws or ideas derived from any foreign source, *Bhyah Singh* v. *Bhyah Ugur Singh*(8): technical rules of English law, altogether foreign to Hindu law and ideas, ought not to be applied in the

(1) (1600) 9 Coke 36(*a*), 39(*a*).
(2) (1868) L. R. 3. Ch. App. 505.
(3) (1877) 46, L. J. Ch. 268.
(4) (1796) 3 Ves. 244.
(5) (1807) 14 Ves. 372.
(6) (1889) 58 L.J. Ch. 662.
(7) (1852) 2 DeG. M. & G. 715.
(8) (1870) 13 Moo. I. A. 373, 390; 5 B. L. R. 293.

construction of Hindu gifts and wills. Now the term "kindred," as pointed out in the Oxford Dictionary (Vol. V, page 702), though ordinarily employed to indicate relationship by blood or descent, is occasionally, though perhaps not very correctly from the point of view of the technicalities of English Jurisprudence, used to indicate relationship by marriage, and reference is made to a passage from Green (Short History, III, section 7, 148), in which the learned writer states: "A secret match with the King's sister raised him to kindred with the throne." It is not necessary, however, to rely upon what may, perhaps, be deemed a somewhat loose use of the expression kindred. But the same remark can hardly be applied to the definition of the term "next-of-kin" in the Administrator-General's Act, 1874, where it is made to include a widower as well as a widow. We are, however, on more solid ground when we bear in mind the conception of the marriage relationship as understood by Hindu jurists, and hold that a wife may be deemed as standing in the relation of kindred to her husband. In Chapter XI, section 1, paragraph 2 of the *Dayabhaga*, Jimutavahana observes as follows:

"Vrihaspati says: In scripture and in the code of law, as well as in popular practice, a wife is declared by the wise to be half the body of her husband, equally sharing the fruit of pure and impure acts; of him whose wife is not deceased, half the body survives: how then should another take his property while half of his person is alive? Let the wife of a deceased man, who left no male issue, take his share notwithstanding kinsmen (sakulya), a father, a mother or uterine brother be present. Dying before her husband, a virtuous wife partakes of his consecrated fire, or if her husband die before her, she shares his wealth: this is a primeval law."

In another passage, again, in the *Dayabhaga*, chapter IV, section 2, paragraph 14, Jimutavahana observes as follows:

"Here *yautuka* signifies property given at a marriage; the word *yuta*, derived from the verb 'yu,' to mix, imports mingling, and mingling is the

1911

DINESH CHANDRA ROY CHOWDHURY v. BIRAJ KAMINI DASEE

MOOKERJEE J.

union of man and woman as one person, and that is accomplished by marriage. For a passage of scripture (Veda) expresses, her bones become identified with his bones, flesh with flesh, skin with skin. Therefore, what has been received at the time of the marriage is denominated *yautuka*."

To the same effect is Manu (IX, 45, 46):

"The husband is even one person with his wife for all religious, not civil, purposes. Neither by a sale nor desertion can a wife be released from her husband."

The identity of person between husband and wife thus emphatically expounded for religious purposes is also indicated by Vijnaneswara in his *Mitakshara* where he comments upon verse 52 of Book II of the Institutes of Yajnavalkya: see the passage translated by Sastri Golap Chandra Sarkar in his treatise on Hindu Law (4th Ed., page 186). The same view is luminously expounded by Savara Swami in his *Bhasya* on the Purva Mimansa (Book VI, Section 1, Sutras 13 to 17). A practical application of this doctrine will be found indicated in the case of *Srinath Das* v. *Probodh Chunder Das* (1), where it is pointed out that a Hindu wife's right to maintenance may be and has on good grounds been attributed to a kind of identity with her husband in proprietary right, though her right may be of a quite subordinate character: but it is by virtue of this right that she gets a share equal to that of a son when partition takes place at the instance of male members: West and Buhler, Digest of Hindu Law, 3rd Ed., pp. 262 and 392. In view of this principle which lies at the root of the Hindu conception of marriage, it may be reasonably held, without undue violence to the language used in the exception to section 99 of the Indian Succession Act, when it is sought to be applied to the case of a Hindu will, that a bequest made by a father to the would-be wife of his son may be deemed a bequest to a person described as standing

(1) (1910) 11 C. L. J. 580.

in a particular degree of kindred to his son. If this interpretation is adopted, there can be no room for controversy that the bequest in this case is valid.

The result, therefore, is that the entire bequest must be sustained, the decree of the Subordinate Judge affirmed, and this appeal dismissed with costs.

CASPERSZ J. By his will, dated the 22nd May 1889, Navadwip Chandra Sarkar provided, *inter alia*, that the wives of two of his sons were to get a quarter share each of his property, and that, if his said sons were not married at his death, the gift would take effect (after an intermediate enjoyment by the testator's youngest son) when his sons did marry. It is not disputed that the two sons married after the death of Navadwip Chandra Sarkar; that the persons who became their wives were in existence when the testator died; and that the plaintiffs Nos. 2 and 3 are the sons of those ladies who are not now alive.

Both the lower Courts have decreed the suit for recovery of possession of the disputed lands upon declaration of the plaintiffs' title as founded on the bequest made by Navadwip Chandra Sarkar. The contention of the defendant No. 1, the appellant in this Court, is that the bequest being invalid, the plaintiffs Nos. 2 and 3 derived no title to the property in suit.

The arguments at the bar have turned upon the construction of section 99 of the Succession Act, which runs thus: "Where a bequest is made to a person by a particular description, and there is no person in existence at the testator's death who answers the description, the bequest is void."

"*Exception:* If property is bequeathed to a person described as standing in a particular degree of kindred

1911

DINESH CHANDRA ROY CHOWDHURY v. BIRAJ KAMINI DASEE.

CASPERSZ J.

to a specified individual, but his possession of it is deferred until a time later than the death of the testator, by reason of a prior bequest, or otherwise; and if a person answering the description is alive at the death of the testator, or comes into existence between that event and such later time, the property shall, at such later time, go to that person, or, if he be dead, to his representatives."

Section 99 of the Succession Act has been made applicable (by section 2 of the Hindu Wills Act) to Hindu wills made after the 1st September 1870, but the exception has been held to be inoperative in the case of Hindus, even when they are governed by the Hindu Wills Act, because their law does not permit bequests to persons who were unborn at the date of the death of the testator. This is the contention of the defendant No. 1 and, in the alternative, it is urged that the word "kindred" in the exception, means blood relations and not relations, as here, by marriage. I think the defendent No. 1 cannot succeed in either view of the case.

The cardinal rule governing Hindu wills is that a person capable of taking under a will must be such a person as could take a gift *inter vivos*, and, therefore, must either in fact, or in contemplation of law, be in existence at the date of the death of the testator. The daughters-in-law of Navadwip Chandra Sarkar were alive when he died, though they were not then married to his sons. There was no uncertainty as to their existence, and the will made provision for an intermediate enjoyment by one of the sons. But, even if section 99 be not strictly applicable, the word "kindred" in the exception must not be construed in the strict sense of the law of England. The expression "next-of-kin" occurs in section 22 of the Probate and Administration Act (section 199 of the Succession Act),

but it is nowhere defined, except in the Administrator-General's Act which is not applicable in the present instance. The word "kindred" occurs in section 20 of the Succession Act, which, however, is not part of the Hindu Wills Act. In the absence of authority, but in accordance with the principle of the benignant construction enunciated in *Tagore* v. *Tagore* (1), I think that "kindred" should not be limited to blood relations when that word is imported into a Hindu will. The testator did not use it, and the test to be applied is to ascertain whether a gift to a daughter-in-law is lawful under the Hindu law. As to this there can be no doubt. A daughter-in-law can offer the funeral cake (*pinda*) to her father-in-law. She is capable of receiving a gift from him during his life-time. It is clear that she can, similarly, take the gift after his death.

The views I am disposed to adopt are in accordance with the decision of this Court in *Nafar Chandra Kundu* v. *Ratnamala Debi* (2) where certain observations of the Privy Council in *Tagore* v. *Tagore* (1) are cited: "Their Lordships, while adopting and acting upon the clear general principle of Hindu Law that a donee must be in existence, desire not to express any opinion as to certain exceptional cases of provisions by way of contract or of conditional gift on marriages or other family provisions for which authority may be found in Hindu Law."

I agree, therefore, that this appeal must fail and be dismissed with cost.

S. C. G.

Appeal dismissed

(1) (1872) L. R. I. A., Sup. Vol. 47, 70; 9 B. L. R. 377.

(2) (1910) 13 C. L. J. 85; 15 C. W. N. 66.

CIVIL RULE.

Before Mr. Justice Mookerjee and Mr. Justice Carnduff.

1911

June 28.

BEGG, DUNLOP & Co.

v.

JAGANNATH MARWARI.*

Prohibitory order—Jurisdiction—Execution of decree—Civil Procedure Code (Act V of 1908), o. XXI, r. 46—Competency of Court to issue prohibitory order outside its jurisdiction restraining a person from paying a debt due to the judgment-debtor.

It is not competent to a Court, in execution of a decree for money, to attach, at the instance of the decree-holder, a debt payable to the judgment-debtor outside the jurisdiction, by a person not resident within the jurisdiction of that Court.

RULE obtained by the objectors, Messrs. Begg, Dunlop & Co.

One Jagannath Marwari obtained a decree for money against one Rowland Hill, since deceased, in the Court of the Subordinate Judge of Burdwan. The decree-holder made an application for execution of the said decree in the Burdwan Court against Mrs. Annie Hill, executrix to the estate of the aforesaid Rowland Hill, deceased. He next applied for an order of attachment of a sum of Rs. 6,750 out of the amount alleged to be due to the judgment-debtor from the firms of Messrs. Begg, Dunlop & Co. and Messrs. Williamson, Magor & Co., carrying on business in the town of Calcutta. The learned Subordinate Judge thereupon issued a prohibitory order under rule 46 of order XXI of the Code of Civil Procedure, 1908, which was served upon the said firms. Against

* Civil Rule No. 5010 of 1910, against the order of Bankim Chandra Mitra, Subordinate Judge of Burdwan, dated Sept. 19, 1910

this prohibitory order an objection was filed by them on the ground that the Burdwan Court had no jurisdiction to attach the money in their hands, as they carried on business in Calcutta, and the debt was payable outside its jurisdiction. The learned Subordinate Judge overruled the objection, and allowed execution to proceed, by an order dated the 19th of September, 1910.

Against this decision the objectors moved the High Court and obtained this Rule.

Mr. B. C. Mitter (with him *Babu Manmatha Nath Mukherjee* and *Babu Satis Chandra Sen*), for the petitioners. The Burdwan Court had no jurisdiction to issue a prohibitory order beyond the local limits of its jurisdiction. I rely on the cases of *Abdul Gafur* v. *W. J. Albyn* (1), *Rango Jairam* v. *Balkrishna Vithal* (2), *Sayadkhan* v. *Davies* (3), *Moonshee Hossein Alli* v. *Ashotosh Gangoolly* (4) and *Parbati Charan* v. *Panchanand* (5). The attachment could only be made after transfer of the decree to the Court in whose jurisdiction the debtor resides. The learned Subordinate Judge's view that such a debt could be attached before judgment is not correct; there is no analogy between an attachment before judgment and issuing of prohibitory order beyond the local limits of the jurisdiction of the Court. The view expressed by Sir Barnes Peacock in *In re Hollick* (6) was not followed in later cases. It was more in the nature of an *obiter dictum*.

Babu Surendra Nath Ghoshal, for the opposite party. In a previous execution proceeding between

(1) (1903) I. L. R. 30 Calc. 713.
(2) (1887) I. L. R. 12 Bom. 44.
(3) (1903) I. L. R. 28 Bom. 198.
(4) (1878) 3 C. L. R. 30.
(5) (1884) I. L. R. 6 All. 243,
(6) (1868) 2 B. L. R. 108; 10 W. R. 447.

1911

BEGG, DUNLOP & Co. v. JAGANNATH MARWARI.

the same parties, the propriety of a similar order was not questioned by the petitioner, but on the contrary it was admitted that the Subordinate Judge had ample jurisdiction to issue the prohibitory order: see Civil Rule Nos. 2533 and 2534 of 1908. In Miscellaneous Appeal No. 435 of 1909, Mr. Justice Brett observed that the proper remedy of the decree-holder was to attach the money in deposit with the petitioners. The order passed by the learned Subordinate Judge was a correct order, regard being had to the decision of Sir Barnes Peacock in *In re Hollick* (1). In the present case both the original judgment-debtor and the decree-holder were resident within the jurisdiction of of the learned Subordinate Judge. The right to the debt accrued to the judgment-debtor within his jurisdiction; and the objector submitted to the jurisdiction of the Subordinate Judge of Burdwan by not objecting to it in the previous execution proceeding. In this view, the case of *Abdul Gafur* v. *W. J. Albyn* (2) is distinguishable. Order XXI, rule 46, is wide enough to include such cases. If the order passed by the learned Subordinate Judge be held to have been passed without jurisdiction, an order for the appointment of a Receiver should be made.

Cur. adv. vult.

MOOKERJEE J. The Court is invited in this Rule to consider the legality of an order, by which the Subordinate Judge has directed attachment of a debt payable outside his jurisdiction. The circumstances under which the attachment has been made have not formed the subject of controversy before us. The decree-holder, opposite party, one Jagannath Marwari, held a decree for money against one Rowland Hill,

(1) (1868) 2 B. L. R. 108; 10 W. R. 447.

(2) (1903) I. L. R. 30 Calc. 713.

now deceased. Upon the death of the judgment-debtor, he sought to enforce the decree against his widow Annie Hill, as executrix to the estate of her husband. It appears that Rowland Hill was entitled to obtain a large sum of money from Messrs. Begg, Dunlop & Co. and Messrs. Williamson, Magor & Co., two firms of merchants carrying on business in the town of Calcutta. The decree under execution had been made by the Court of the Subordinate Judge of Burdwan, and the application for execution had, in the usual course, been presented to that Court. The decree-holder next applied for an order of attachment of a sum of Rs. 6,750 out of the amount alleged to be due to the judgment-debtor from the two firms just mentioned. The Subordinate Judge thereupon issued a prohibitory order under rule 46 of order XXI of the Code of 1908, which was served upon the two firms on the 13th August, 1910. The firms filed an objection against the prohibitory order, amongst others on the ground that the Burdwan Court had no jurisdiction to attach the money in their hands, as they carried on business in Calcutta and the debt was also payable outside the jurisdiction of the Court. The Subordinate Judge, on the 19th September, 1910, overruled this objection, and held that he had power to issue a prohibitory order, under rule 46, beyond the local limits of his jurisdiction. We are now invited to set aside this order, on the ground that the prohibitory order was beyond the competency of the Court, and that the Subordinate Judge had exercised a jurisdiction not vested in him by law. In support of the Rule, reliance has been placed upon the cases of *Abdul Gafur* v. *W. J. Albyn* (1), *Rango Jairam* v. *Bal Krishna* (2) and *Sayad Khan* v. *Davies* (3).

(1) (1903) I. L. R. 30 Calc. 713. (2) (1887) I. L. R. 12 Bom. 44.
(3) (1903) I. L. R. 28 Bom. 198.

1911

BEGG, DUNLOP & Co. v. JAGANNATH MARWARI.

MOOKERJEE J.

Reference has also been made to the cases of *Moonshee Hossain Alli* v. *Ashotosh Gangoolly* (1) and *Parbati Charan* v. *Panchanad* (2). In answer to the Rule, on the other hand, reliance has been placed upon the case of *In re Hollick* (3). It may be conceded that the observations of the learned Judges, who decided the case last mentioned, do tend to support the contention of the decree-holder, that it was competent to the Subordinate Judge to issue a prohibitory order upon a person, resident outside the jurisdiction of his Court, restraining him from paying a debt due to the judgment-debtor of the execution-creditor. This view, however, has not been accepted in the other cases, upon which reliance is placed by the petitioner, and in the case of *Abdul Gafur* v. *W. J. Albyn* (4) the Court declined to follow the decision in *In re Hollick* (3). Under these circumstances, and in view of the fact that the decisions mentioned turn upon the construction of the Codes of 1859 and 1882, it is incumbent upon the Court not merely to examine the provisions of the Code of 1908, which alone are applicable to the case before us, but also to consider the question as one of principle.

Section 38 of the Civil Procedure Code of 1908 provides that a decree may be executed either by the Court which passed it, or by the Court to which it is sent for execution. Section 39 specifies the circumstances under which the Court, which passed the decree, may, on the application of the decree-holder, send it for execution to another Court. Clause (*a*) of this section provides that a decree may be transferred, if the person against whom the decree has been passed actually and voluntarily resides within

(1) (1878) 3 C. L. R. 30.
(2) (1884) I. L. R. 6 All. 243.
(3) (1868) 2 B. L. R. 108; 10 W. R. 447.
(4) (1903) I. L. R. 30 Calc. 713.

the local limits of the jurisdiction of the Court to which the decree is sent for execution. Clause (*b*) provides that a decree may be transferred, if the judgment-debtor has not property within the local limits of the jurisdiction of the Court which passed the decree sufficient to satisfy such decree, and has property within the local limits of the jurisdiction of the other Court. Clause (*c*) deals with the case of a decree for the sale or delivery of immovable property situated outside the local limits of the jurisdiction of the Court which passed it. These provisions of section 38, read along with those of section 39, plainly indicate the acceptance by the Legislature of the general principle that no Court can execute a decree in which the subject-matter of the suit or of the application for execution is property situated entirely outside the local limits of its jurisdiction. This elementary principle was recognised by a Full Bench of this Court in *Prem Chand* v. *Mokhoda* (1). It is needless for the purposes of the present case to formulate the exceptions to this rule ; it is sufficient to indicate that, in cases of decrees for sale of mortgaged property, an exception has been recognised: *Maseyk* v. *Steel* (2), *Kartick Nath Pandey* v. *Tilukdhari Lall* (3), *Gopi Mohan* v. *Doybaki* (4), *Tincouri Debya* v. *Shib Chandra Pal* (5), *Latchman* v. *Maddan Mohun* (6) and *Jahar* v. *Kamini Debi* (7). An exception has also been recognised by the new Code in cases of attachment of salaries of public officers under rule 48, and of sale of entire estates situated within the local limits of the jurisdiction of more than one Court, under rule 3

(1) (1890) I. L. R. 17 Calc. 699, 703.
(2) (1887) I. L. R. 14 Calc. 661.
(3) (1888) I. L. R. 15 Calc. 667.
(4) (1891) I. L. R. 19 Calc. 13.
(5) (1894) I. L. R. 21 Calc. 639.
(6) (1880) I. L. R. 6 Calc. 513.
(7) (1900) I. L. R. 28 Calc. 238.

1911

BEGG, DUNLOP & CO. v. JAGANNATH MARWARI.

MOOKERJEE J.

of order XXI. It is not necessary, however, as just stated, to attempt an exhaustive enumeration of all possible exceptions to the general principle. The sole question for consideration now is, whether the principle should be held inapplicable to the case of attachment of a debt payable outside the jurisdiction of the Court by a person who also resides beyond the local limits of such jurisdiction.

Rule 43 of order XXI provides the mode of attachment of moveable property, other than agricultural produce, in possession of the judgment-debtor: such attachment must be effected by actual seizure, and it is reasonably plain that the attachment can be so effected only when the property is within the jurisdiction of the Court. Rule 46 then provides for the attachment of moveable property not in possession of the judgment-debtor, including a debt not secured by a negotiable instrument. The attachment is to be effected by a written order, prohibiting the creditor from recovering the debt and the debtor from making payment thereof until further orders of the Court. A copy of such order must be affixed on a conspicuous part of the Court house, and another copy sent to the debtor. It is further provided that a debtor, so prohibited, may pay the amount of his debt into Court, and such payment shall discharge him as payment to the party entitled to receive the same. The substance of the procedure, therefore, is that, upon the application of the decree-holder, the Court records an order which prohibits the judgment-debtor, who is the creditor of the debtor, from recovering the debt, and also prohibits the debtor from paying the debt to his creditor. A copy of the order is published in the Court house, and another copy is sent for communication to the debtor. I am unable to hold, on principle, that it is competent to a Court to

issue such a prohibitory order upon a person, resident outside the local limits of its jurisdiction, in respect of property also beyond such local limits. If such a person disobeyed the order of the Court, and in defiance thereof made the payment, the Court would be powerless to enforce its order by proceedings in contempt. On the other hand, there is no good reason why the decree-holder should not apply for transfer of the decree to the Court, within the local limits of which the garnishee, that is, the debtor of the judgment-debtor, resides. Two objections, however, have been suggested to the adoption of such a course. It has been contended in the first place that the delay, which must necessarily take place before an order of transfer could be obtained, might prove fatal to the decree-holder, who might find that the judgment-debtor had, in collusion with his debtor, received payment of the debt sought to be attached. The obvious answer is, that the procedure of attachment under precepts, provided in section 46 of the Code of 1908, furnishes a speedy and effective remedy. The object of a precept is to enable a decree-holder to obtain *interim* attachment where there is ground to apprehend that he may otherwise be deprived of the fruits of his decree. Section 46 expressly provides that, upon the application of the decree-holder, the Court, which passed the decree, may, whenever it thinks fit, issue a precept to any other Court, which would be competent to execute such decree, to attach any property belonging to the judgment-debtor and specified in the precept: and the Court, to which a precept is so sent, shall proceed to attach the property in the manner prescribed in regard to the attachment of property in execution of a decree. This provision plainly indicates that the Legislature did not intend that a Court should directly

1911

BEGG, DUNLOP & Co. v. JAGANNATH MARWARI.

MOOKERJEE J.

attach property beyond the local limits of its jurisdiction. It has been argued, in the second place, that, if the contention of the petitioners prevails, two separate orders would be required in respect of the same matter: that is, an order by the Court, which passed the decree, upon the judgment-debtor prohibiting him from recovering the debt, and an order by the Court, to which the decree has been transferred for execution, upon the debtor of the judgment-debtor prohibiting him from making payment thereof. This, in substance, was the argument which found favour with the learned Judges who decided the case of *In re Hollick* (1). I do not feel pressed by the weight of this contention. The course suggested does not lead to any serious inconvenience. On the other hand, if the prohibitory order is issued by the Court which made the decree, to a person beyond the local limits of its jurisdiction, the order may prove infructuous, if it is disobeyed, and the Court may find itself powerless to enforce it.

Under these circumstances we are confirmed in the opinion that it is not competent to a Court, in execution of a decree for money, to attach at the instance of the decree-holder, a debt payable to the judgment-debtor by a non-resident outside the jurisdiction. Rule 48 of order XXI also tends to support this view. It is well-known that, under the law as it stood before the Code of 1908, it had been ruled that the salary of a public officer or railway servant could not be attached, unless the disbursing officer was within the local limits of the jurisdiction of the Court executing the decree: *Rango* v. *Bal Krishna* (2), *Saiyad Khan* v. *Davies* (3), *Abdul Gafur* v. *W. J. Albyn* (4). This

(1) (1868) 2 B. L. R. 108; 10 W. R. 447.

(2) (1887) I. L. R. 12 Bom. 44.

(3) (1903) I. L. R. 28 Bom. 198.

(4) (1903) I. L. R. 30 Calc. 713.

led to considerable inconvenience in the execution of decrees, and put the decree-holder in many cases to needless expense. In view of the difficulty thus created, the Legislature has provided in rule 48 of order XXI a less expensive, and, at the same time, a more effective, machinery for the execution of decrees against this class of judgment-debtors. Under the law as it now stands, the salary of a public officer, or a railway servant, or a servant of a local authority may be attached, whether the judgment-debtor or the disbursing officer is or is not within the local limits of the jurisdiction of the Court executing the decree. The inference may, therefore, be legitimately drawn that the Legislature has provided a special rule in the case of certain judgment-debtors because rule 46 does not entitle the execution Court to attach a debt payable to the judgment-debtor by a non-resident outside the jurisdiction of the Court. The view we take of the principle applicable to this class of cases is also supported by the decision in *Moonshee Hossein Alli* v. *Ashotosh Gangoolly* (1) which was accepted as good law by a Full Bench of the Allahabad High Court in *Parbati Charan* v. *Panchanand* (2). These cases support the view that a Court could not issue a prohibitory order, under section 268 of the Code of 1877, out of its own jurisdiction. We may further add that as pointed by Mr. Justice Banerjee in *Abdul Gafur* v. *W. J. Albyn* (3) the contrary opinion indicated in *In re Hollick* (4) is really an *obiter dictum*, because there the order was made by the Monghyr Court within whose jurisdiction the office of the disbursing officer was held at Jamalpur. With all respect, therefore, for the opinion of the learned Judges

(1) (1878) 3 C. L. R. 30.
(2) (1884) I. L. R. 6 All. 243.
(3) (1903) I. L. R. 30 Calc. 713.
(4) (1868) 2 B. L. R. 108; 10 W. R. 447.

1911

BEGG, DUNLOP & Co. v. JAGANNATH MARWARI.

MOOKERJEE J.

who decided that case, we are unable to accept it as well founded on principle.

It is worthy of note that the view we have adopted is in harmony with the procedure followed both in England and America. In England it is expressly provided in rule 1 of order 45 of the Rules of the Supreme Court that an order for attachment of a debt may be made only when the person indebted to the judgment-debtor of the execution-creditor is within the jurisdiction of the Court. The same rule has been adopted in Ireland, where also rule 1 of order 45 of the Rules of the Supreme Court, Ireland, 1905, provides that, before a garnishee order can be obtained, it must be shown that the debtor of the judgment-debtor is within the jurisdiction. A similar view had been taken in Ireland even before the Judicature Act, Ireland, 1877. Thus, we find that in *Martyn* v. *Kelly* (1) it was accepted as settled law, that a debt could not be attached under the garnishee clauses of the Common Law Procedure Act, 1856, unless the garnishee was within the jurisdiction: and that consequently a registered company, whose head office was in London, was not within the jurisdiction, within the meaning of section 63 of the Statute, although it had an agent residing in Ireland and transacting its business there. In the American Courts, there has been considerable controversy and divergence of judicial opinion upon the question of the situs of a debt for purposes of garnishment proceedings, but it is well settled that, in the absence of express statutory provision to the contrary, a non-resident of a State cannot be summoned in garnishment proceedings, whether the principal debtor be a resident or non-resident, at least unless he is in possession of

(1) (1871) I. R. 5 C. L. 404.

property within the State belonging to the principal debtor, or is indebted to him, and such debt is, by the terms of the contract, to be liquidated within the State. The principle upon which this result is reached is lucidly explained by Chief Justice Drake in his classical treatise on the Law of Attachment (7th edition, section 474). It is there pointed out that under the custom of London one cannot be charged as garnishee, unless he resides within the jurisdiction of the Court of Lord Mayor: *Tamm* v. *Williams* (1), *Crosby* v. *Hetherington* (2) and *Day* v. *Paupierre* (3). This doctrine was accepted as well-founded on principle in *Tingley* v. *Bateman* (4) and *Nye* v. *Liscomb* (5), where the Court observed as follows: "The summoning of a trustee is like a process *in rem*. A chose in action is thereby arrested and made to answer the debt of the principal. The person entitled by the contract of the supposed trustee is thus summoned by the arrest of this species of effects. These are, however, to be considered for this purpose as local and as remaining at the residence of the debtor or person entrusted for the principal, and his rights in this respect are not to be considered as following the debtor to any place where he may be transiently found, to be there taken at the will of a third person within a jurisdiction where neither the original creditor nor debtor resides." In two later cases, *Ray* v. *Underwood* (6) and *Hart* v. *Anthony* (7), the same doctrine was affirmed, although the defendant was resident within the jurisdiction of the Court and the garnishee was non-resident. Similar expositions are adopted by Reno in his treatise on "Non-residents"

(1) (1783) 3 Doug. 281; 2 Chitty 438.
(2) (1842) 4 Man. & Gr. 933.
(3) (1849) 13 Q. B. 802.
(4) (1813) 10 Mass. 343.
(5) (1838) 21 Pickering 263.
(6) (1825) 3 Pickering 302.
(7) (1834) 15 Pickering 445.

1911

BEGG, DUNLOP & CO. v. JAGANNATH MARWARI.

MOOKERJEE J.

(section 147), and by Waples in his monograph on "Situs of Debt" (section 161). The question is elaborately discussed in *National Fire Insurance Co.* v. *Chambers* (1), where it is explained that the test to be applied is, whether the judgment-debtor, as creditor, could have sued the garnishee as his debtor in the Court in which the execution proceedings have been commenced. In its essential elements, a garnishment proceeding is a proceeding by the defendant in the suit against the garnishee, in the name and for the benefit of the plaintiff. The plaintiff is empowered by law to step into the shoes of the garnishee's creditor and acquire his rights, no more and no less; see *In re General Horticultural Co.* (2), where a similar test was suggested by Mr. Justice Chitty. Whatever he could do, the plaintiff decree-holder, under the statutory novation of garnishment, may do as his assignee and attorney in fact, by operation of law. Wherever the garnishee could be sued by the defendant for the payment, he may be charged as garnishee on account of it: *Mooney* v. *Buford* (3), *German Bank* v. *American Fire Insurance Co.* (4), *Burlington Ry. Co.* v. *Thompson* (5) *Wyeth* v. *Lang* (6) *Cross* v. *Brown* (7), *Mobile Ry. Co.* v. *Burnhill* (8) and *Neufelder* v. *German Insurance Co.* (9). If this be adopted as the true criterion to determine the situs of a debt in garnishment, no difficulty is presented in the solution of the problem (Rood on

(1) (1895) 32 Atl. 663; 53 N. J. Eq. 468.
(2) (1886) 32 Ch. D. 512 (516).
(3) (1896) 72 Fed. Rep. 32.
(4) (1892) 83 Iowa. 491; 32 Am. St. Rep. 316.
(5) (1884) 31 Kan. 180; 47 Am. Rep. 497.
(6) (1894) 127 Missouri 242; 48 Am. St. Rep. 626.
(7) (1897) 19 R. I. 220.
(8) (1892) 91 Tenn. 399; 30 Am. St. Rep. 889.
(9) (1893) 6 Wash. 336; 36 Am. St. Rep. 166.

Garnishment, sections 241—245). From this point of view, it becomes needless to consider whether the principle, upon which the situs of a debt is determined for purposes of garnishment, is necessarily identical with what determines the rights of the parties. Nor is it necessary to examine the validity of the rule of law, by which a debt like other personal property is deemed for many purposes (such as transmission and succession) to attach to the person of the owner, that is, the creditor. The case before us, in which the garnishees are admittedly out of jurisdiction, and the debts due from them are also payable out of jurisdiction, does not present any real difficulty. The Court cannot, in a case of this description, issue a prohibitory order under rule 46 of order XXI of the Code of 1908. We may add that the principle which underlies the decisions of this Court in *Vulcan Iron Works* v *Bishumbhur Prasad* (1) and *Jumna Dass* v. *Harcharan Dass* (2), and of the House of Lords in *Carron Iron Co.* v. *Maclaren* (3) also supports this view. The order of the Court below, therefore, must be taken to have been made without jurisdiction.

There are two other points which require a brief consideration. The Subordinate Judge has held that, as in the case of an attachment before judgment, the writ can be issued in respect of properties outside jurisdiction [*Nur Muhamed* v. *Ibrahim* (4), *Ram Pertab* v. *Madho Rai* (5) and *Amara* v. *Annamala* (6)], the same doctrine ought to be applied to cases of attachment in execution proceedings. But apart from the fact that there is weighty authority against this view [*Balaram* v. *Solano* (7), *Kedar Nath* v.

(1) (1908) I. L. R. 36 Calc. 233.
(2) (1911) I. L. R. 38 Calc. 405.
(3) (1855) 5 H. L. C. 416.
(4) (1871) 8 Bom H. C (O.C.) 29.
(5) (1902) 7 C. W. N. 216.
(6) (1908) I. L. R. 31 Mad. 502.
(7) (1872) 8 B. L. R. 335.

1911

BEGG, DUNLOP & CO. v. JAGANNATH MARWARI

MOOKERJEE J.

Luchmun(1), *Krishna Sami* v. *Engel*(2), *Raja* v. *Janki Bai* (3), *Dawood* v. *Moona* (4), *Pannu* v. *Sathappa* (5), *Siva Swami* v. *Soleman* (6) and *Kinkin* v. *Naga Kyaw* (7)], there is no analogy between the two classes of cases. In the case of an attachment before judgment, the question turns upon the construction of order XXXVIII, rules 5 and 6, read with section 136. Besides, in the case of an attachment before judgment, the garnishee cannot be required to pay the debt into Court for the benefit of the plaintiff. Whether, after attachment has been so obtained before judgment, it can subsequently be made available for the benefit of the successful plaintiff, is a question by no means free from difficulty, and does not require consideration in the present instance. It has also been argued by the learned vakil for the decree-holder opposite party that, as on a previous occasion, the garnishees did not take any objection to the jurisdiction of the Court to issue a prohibitory order under rule 46, they are not entitled to urge the objection in the present proceedings. There is no substance in this contention. The previous proceeding proved infructuous under circumstances which we need not explain, and it is open to the garnishees to urge the objection they have taken when a fresh attachment is sought in respect of the debts payable by them to the original judgment-debtor.

The result, therefore, is that this Rule must be made absolute, and the order of the Court below discharged. The petitioners are entitled to their costs both here and in the Court below.

CARNDUFF J. I agree.

S. C. G.

Rule absolute.

(1) (1878) 1 C. L. R. 336.
(2) (1884) I. L. R. 8 Mad. 20.
(3) (1903) 5 Bom. L. R. 570.
(4) (1894) P. J. L. B. 56.
(5) (1902) 1 L. B. R. 310.
(6) (1907) 3 L. B. R. 255.
(7) (1907) U. B. R. 13.

APPELLATE CRIMINAL.

Before Mr. Justice Caspersz and Mr. Justice Sharfuddin.

LALIT CHANDRA CHANDA CHOWDHURY

v.

EMPEROR.*

1911

Aug. 8.

Magistrate—Jurisdiction—Cognizance of an offence under the Penal Code—Incompetence to take cognizance, on the same facts, of an offence under a Special Act, for want of consent of Government—Subsequent complaint to a superior Magistrate of an offence under the Special Act, with the necessary consent obtained from Government—Jurisdiction of latter to take cognizance without withdrawal of the case to his own file—Search for explosives in the presence of police officers of superior rank—Legality of search—Opinion of Assessors, how to be recorded—Preparation to commit dacoity—Admissibility of documents found in possession of the accused—Criminal Procedure Code (Act V of 1898), ss. 190, 309, 529(e), 530(k), and 531—Penal Code (Act XLV of 1860), s. 399—Explosive Substances Act (VI of 1908), ss. 4(b) and 7—Indian Explosives Act (IV of 1884), Rule 32(1) (b) of Government Rules.

Where a complaint was filed by a Sub-Inspector of Police before the Subdivisional Magistrate of an offence under section 399 of the Penal Code, and the facts disclosed also an offence under section 4(*b*) of the Explosive Substances Act (VI of 1908), of which the Magistrate could not then take cognizance for want of the consent of Government under section 7 of the Act, and a complaint was subsequently filed by the Superintendent of Police, with such consent obtained, before the Additional District Magistrate :—

Held, that the latter had jurisdiction to take cognizance of the offence and that the initiation and continuation of the proceedings by him were legal notwithstanding that he had not withdrawn the original case to his own file.

Jhumuck Jha v. *Pathuk Mandal* (1), *Golapdy Sheikh* v. *Queen-Empress* (2) [followed in *Radhabullav Roy* v. *Benode Behari Chatterjee* (3)],

* Criminal Appeal No. 392 of 1911, against the order of B. B. Newbould, Sessions Judge of Dacca, dated April 10, 1911.

(1) (1900) I. L. R. 27 Calc. 798. (2) (1900) I. L. R. 27 Calc. 979.
(3) (1902) I. L. R. 30 Calc. 449.

1911

LALIT CHANDRA CHANDA CHOWDHURY v. EMPEROR.

Emperor v. *Sourindra Mohan Chuckerbutty* (1), *Moul Singh* v. *Mahabir Singh* (2), *Charu Chandra Das* v. *Narendra Krishna Chakravarti* (3), *Bishen Doyal Rai* v. *Chedi Khan* (4), and *Jharu Jola* v. *Shukh Deo Singh* (5) distinguished.

Held, also, that, in any case, having regard to sections 529(*e*), 530(*k*), and 531 of the Criminal Procedure Code, unless it appeared that the proceedings wrongly held had, in fact, occasioned a failure of justice, they could not be set aside.

Sonatun Dass v. *Gooroo Churn Dewan* (6) referred to.

A search for explosives by police officers of rank, not below that of an Inspector, is legal under rule 32*(1) (b)* of the Government Rules framed under the IndianExplosives Act (IV of 1884).

Section 309 (*1)* of the Criminal Procedure Code requires the opinions of the Assessors to be stated orally, and not in writing or in the form of a judgment under section 367.

Under section 399 of the Penal Code, having in possession or immediate control any explosive substance is one of several means to the end, whereas, under section 4 *(b)* of the Explosive Substances Act, it is the offence itself, provided the necessary intent is proved.

In order to render documents found in the possession of a party admissible against him as proof of their contents, it is necessary to show that he has in some way identified himself or, in other words, has, by any act, speech or writing, manifested an acquaintance with, and knowledge of, the contents of all or any of them. The rule would apply more strongly where some of the papers and letters were received, and others written, by the party against whom they are sought to be used.

Wright v. *Tatham* (7), and *Barindra Kumar Ghose* v. *Emperor* (8), followed.

ON the 5th September 1910, at 7-30 P.M., the premises of the appellant were searched by the police under the supervision of the Superintendent of Police, and there were found a canister containing eleven bombs, several letters and post-cards, a paper with bomb formulæ, a cypher code, three plans of houses, a list of the names of 13 persons with their parts

(1) (1910) I. L. R. 37 Calc. 412, 416.
(2) (1899) 4 C. W. N. 242.
(3) (1900) 4 C. W. N. 367.
(4) (1900) 4 C. W. N. 560.
(5) (1905) 3 C. L. J. 87, 89.
(6) (1874) 21 W. R. Cr. 88.
(7) (1838) 5 Cl. & Fin, 670, 702.
(8) (1909) I. L. R. 37 Calc. 467.

assigned on the occasion of a contemplated dacoity, four new torches and four swords. The accused, Jyotindra Chandra Chanda Chowdhury and Harkumar Dhar, who were ultimately acquitted, were present in the hut where the bombs and correspondence were discovered when the search commenced, but the appellant was brought in under arrest during the course of it. A first information was drawn up early on the 6th September, the offence being laid under section 399 of the Penal Code. On the same day a complaint was filed by a Police Sub-Inspector before the Subdivisional Magistrate of Munshigunge under the above section. The Magistrate was informed of the application for the consent of Government under section 7 of the Explosive Substances Act (VI of 1908), and waited for the same. In the meantime, after such consent had been obtained, a complaint under section 4(*b*) of the Act was presented on the 9th November 1910 to the Additional District Magistrate of Dacca, who thereupon took cognizance of the case, proceeded with the preliminary inquiry, and committed the accused to the Court of Session at Dacca. The original complaint still remained on the file of the Subdivisional Officer, and no further action was taken on it.

The accused were placed on trial before the Sessions Judge of Dacca with the aid of two assessors. The accused, Jyotindra and Harkumar, were acquitted under section 289(*2*) of the Criminal Procedure Code, there being no evidence against them, and the trial proceeded against the appellant alone. The Assessors found him not guilty, but the Judge, differing from them, convicted and sentenced him to transportation for ten years.

Babu Manmatha Nath Mukherjee and *Babu Narendra Kumar Bose*, for the appellant.

1911

LALIT CHANDRA CHANDA CHOWDHURY v. EMPEROR.

The Advocate-General (Mr. Kenrick, K. C.) and *Babu Mahendra Nath Banerjee*, for the Crown.

CASPERSZ and SHARFUDDIN JJ. This is an appeal from a conviction under section 4(*b*) of the Explosive Substances Act (VI of 1908), which provides that—"Any person who unlawfully and maliciously makes or has in his possession or under his control an explosive substance with intent by means thereof to endanger life, or cause serious injury to property in British India, or to enable any other person by means thereof to endanger life or cause serious injury to property in British India, shall, whether any explosion does or does not take place and whether any injury to person or property has been actually caused or not, be punished. . . ."

The Sessions Judge of Dacca, differing from both the Assessors, has convicted the appellant, Lalit Chandra Chanda Chowdhury, and sentenced him to transportation for ten years. The two co-accused, Jyotindra Chandra Chanda Chowdhury and Harkumar Dhar, were acquitted, under section 289 (*2*) of the Criminal Procedure Code, there being no evidence against them.

We may observe, in passing, that the Assessors did not state their opinions orally, nor did the Sessions Judge record their opinions in the manner provided by section 309 of the Code. The Assessors were allowed to put in written (pencilled) opinions, one of which is almost a judgment within the meaning of section 367 of the Criminal Procedure Code. The intention of section 309 has been defeated by the procedure adopted. Nevertheless, we must and shall consider the reasons which prevailed with the Assessors.

The case for the prosecution is that at 7-30 P.M. on the evening of the 5th September 1910, a search was

conducted of the premises of the appellant, with the result that eleven bombs in a tin box, many post-cards and letters, a paper of bomb formulæ, a cypher code, three plans of houses, a list of 13 persons (with their dispositions in the event of a dacoity), four new torches and four swords were discovered. The two co-accused were in the *basha* or hut, where the principal articles, the bombs and correspondence, were found when the search commenced. The appellant was brought in under arrest during the search. The bombs were submitted to Government experts and classed as coming in the category of "fulminates." In this respect, the Assessors are in agreement with the Sessions Judge that the eleven bombs are explosives within the meaning of the Act, and we accept that conclusion. The same night, or, rather early on the morning of the 6th September 1910, a First Information was drawn up, the offence specified being that of making preparation to commit dacoity (section 399 of the Indian Penal Code). That case came, as a complaint, on the file of the local Subdivisional Magistrate of Munshigunge, and still remains on his file. But on the 9th November 1910, the Superintendent of Police put in another complaint before the Additional District Magistrate of Dacca, together with the Government sanction, or consent, required by section 7 of the Explosive Substances Act (VI of 1908). On this complaint and sanction the proceedings, resulting in the present appeal, were initiated, continued and concluded.

The learned vakil for the appellant has urged (i) that the entire proceedings, including the trial in the Court of Session, were bad in law, because the case was taken cognizance of by an officer (the Additional District Magistrate) who had no jurisdiction in that behalf; (ii) that the original case was commenced

1911

LALIT CHANDRA CHANDA CHOWDHURY v. EMPEROR.

in the court of the Subdivisional Magistrate of Munshigunge who alone had, and, even now has, jurisdiction in the matter; (iii) that the original case, in connection with the intention specified in section 4(*b*) of the Explosive Substances Act, must be deemed to be one under section 399 of the Penal Code, and as such triable by jury; (iv) that the search of the appellant's premises was illegal, not being warranted by any section of any law; (v) that the First Information was not a true and lawful First Information; (vi) that the conviction of the appellant is wrong on the merits.

The questions of law argued on the hearing of this appeal are substantially two in, number, having reference, respectively, to the initiation of the case before the Additional District Magistrate of Dacca and the legality of the search and the First Information at Munshigunge.

The first contention of the learned vakil for the appellant is that the Additional District Magistrate could not take any cognizance of a case already on the file of the Subdivisional Magistrate of Munshigunge, and, in support of this position, reliance is placed on the cases of *Jhumuck Jha* v. *Pathuk Mandal* (1), *Golapdy Sheikh* v. *Queen-Empress* (2), followed in *Radhabullav Roy* v. *Benode Behari Chatterjee* (3), *Emperor* v. *Sourindra Mohan Chuckerbutty* (4), *Moul Singh* v. *Mahabir Singh* (5), *Charu Chandra Das* v. *Narendra Krishna Chakravarti* (6), *Bishen Doyal Rai* v. *Chedi Khan* (7), and *Jharu Jola* v. *Shukh Deo Singh* (8). We do not question the correctness of these authorities. The facts of the

(1) (1900) I. L. R. 27 Calc. 798.
(2) (1900) I. L. R. 27 Calc. 979.
(3) (1902) I. L. R. 30 Calc. 449.
(4) (1910) I. L. R. 37 Calc. 412, 416.
(5) (1899) 4 C. W. N. 242.
(6) (1900) 4 C. W. N. 367.
(7) (1900) 4 C. W. N. 560.
(8) (1900) 3 C. L. J. 87, 89.

present case are altogether different. Cognizance was taken by the Subdivisional Magistrate on a complaint of the offence under section 399 of the Indian Penal Code. That complaint was made by the Sub-Inspector. Admittedly, cognizance was not taken on the First Information. No cognizance was taken, or could be taken, of the offence under section 4(*b*) of the Explosive Substances Act till Government sanction or consent had been obtained and the Superintendent of Police had preferred his complaint. The Subdivisional Magistrate waited for the sanction, as will appear from his order-sheet, but it never reached him because his superior officer, the Additional District Magistrate, received it and took cognizance.

The Munshigunge Magistrate had taken cognizance upon a complaint by a Sub-Inspector. The facts stated in the complaint disclosed that the accused was in possession of bombs which was a preparation to commit dacoity. This fact of possession was mentioned by the Sub-Inspector in his complaint, and it was a necessary element for the purposes of section 399 of the Indian Penal Code. If, as it is said, the Munshigunge Magistrate took cognizance of the offence under the Explosive Substances Act, could he issue process against the accused under that Act? He could not, as the Government had not given its consent. After a Magistrate takes cognizance of an offence, he is empowered either to issue process against the accused, or order an enquiry under section 202 of the Criminal Procedure Code. Could this Magistrate have issued any process against the accused under the Explosive Substances Act, or ordered an enquiry? We think not, as he had no authority to do so. It seems that the Subdivisional Magistrate was informed that an application to Government had been made, and, as the facts constituted an offence

1911

LALIT CHANDRA CHANDA CHOWDHURY v. EMPEROR.

under the Explosive Substances Act also, he waited for the sanction, but this cannot be regarded as taking cognizance under that special law.

It is urged by the learned vakil that the same facts and evidence are involved in both the cases, but the answer to this argument is that the one fact of vital importance, namely, that the bombs were of the kind mentioned in section 4(*b*) of the Explosive Substances Act, was not known till after the Chemical Examiner's Report (dated the 16th September 1910) had been received. The Subdivisional Magistrate could not address his mind to this fact, which was not known on the 6th September 1910 when he took cognizance on the complaint of the Sub-Inspector. Again, the distinction between a case of making preparation to commit dacoity (section 399 of the Indian Penal Code) and a case of having in possession or under control any explosive substance [section 4 (*b*), Act VI of 1908] is that, in the former case, the possession of bombs may be one of several means to the end; in the latter case, it is the offence itself, provided the necessary intent is proved. Such an act of possession of bombs may be said to constitute an offence falling within two separate definitions of the law, but, though the Subdivisional Magistrate might have enquired into two such offences, he was unable to do so, and the Additional District Magistrate had jurisdiction by reason of the complaint made to him and the Government consent to that jurisdiction being exercised.

A distinction is also sought to be made between the taking cognizance of an offence and proceeding to try it, the latter expression being used in section 7 of the Explosive Substances Act. The distinction, if it can exist, disappeared when the Additional District Magistrate took cognizance and proceeded to enquire

into the case. The first contention, therefore, is overruled. We hold that the present case was properly initiated and the trial of the appellant was a good trial.

The second contention is equally devoid of foundation. The search was conducted, not under the Code of Criminal Procedure, but under rule 32 of the Government Rules under the Indian Explosives Act, 1884 (see pp. 396, 397, Vol. IV, General Statutory Rules and Orders, Ed. 1910). At the search, on the 5th September 1910, police officers of superior rank were present, including the Superintendent of Police himself. The proceedings, therefore, were legally conducted. Similarly, although the First Information did not form the basis of the case now pending before the Subdivisional Magistrate, it was really the earliest information in the case, because no offence had been disclosed until the search resulted in the finding of the bombs and other articles. We have not treated the First Information as evidence against the appellant for the reason that the present case was otherwise initiated, on the 9th September 1910, four days later. It may be added, with reference to section 529 (*e*), section 530(*k*), and section 531 of the Code, that, unless it appears that the proceedings wrongly held have, in fact, occasioned a failure of justice, they cannot be set aside. This case would have been committed for trial even if enquired into by the Munshigunge Magistrate, and the same Sessions Court would have tried it. In *Sonatun Dass* v. *Gooroo Churn Dewan*(1), where objection to the jurisdiction of a court was not seriously taken, and the petitioner failed to show that he had been in any way prejudiced, the High Court declined to interfere. In the case before us the objection was, for the first time, taken in this Court. . . . .

(1) (1874) 21 W R. Cr. 88.

1911

LALIT CHANDRA CHANDA CHOWDHURY v. EMPEROR.

[After discussing the merits of the case, their Lordships continued:—]

The next question is whether the lodging and its contents were in the conscious possession of the appellant. It has been already stated that he had been residing there for some time before, and up to the 5th September 1910. It is in evidence (page 112) that the co-accused Jyotindra actually gave Mr. Dundas a *dao* wherewith to force open the box (Ex. 1): this he would hardly have done if he had been aware of the dangerous contents of that box. From this fact, and from the fact that, in consequence of information received from the co-accused, the appellant, Lalit, was immediately pursued and brought, the inference seems a fair one to make that the appellant was then the responsible person in possession of the lodging. The correspondence found in the principal hut also shows that the appellant had his residence there, but, before we examine the papers, it will be necessary to consider the evidence of the three witnesses who speak to the handwriting of the appellant.

The three witnesses to the handwriting of the appellant are Nos. 7, 8 and 9. Of these, Doctor Ajodhya Ram Deb Roy saw the appellant writing because he used to read with Manosha, the distant nephew of the witness, who, it may be noted, is the brother-in-law of Amulya Krishna De, to whom the label, on the canister of bombs, purported to have been addressed. The witness was not in a very favourable position to scrutinize the handwriting of the appellant, but he used to "see" (this may mean "examine," but the point is not clear) the boy's answers to examination papers. We are not disposed to place implicit reliance on the evidence of Doctor Ajodhya, but of his truthfulness we entertain no doubt. The next witness, Pandit Mukundananda

Siroratna, is an entirely satisfactory and, admittedly, a truthful, witness. He is the Head Pandit of the school where the appellant studied, and the appellant's work came directly under his observation. He is a careful and cautious man, and we have no hesitation in accepting his opinion as to the Bengali handwriting of the appellant. He has identified the principal documents, found at the house search, as having been written by the appellant. The third witness, Manomohan Dey, describes himself as a talukdar and servant. He says he saw the appellant write at the house of Hari Churn Ghose who is the mother's first cousin's son of the witness, and at the house of the witness himself whose nephew's private tutor used to instruct the appellant. The evidence of Manomohan Dey is no better than that of Doctor Ajodhya.

We have compared, for ourselves, the various exhibits in this case; among other resemblances, the shape of the "M" is very characteristic, but we do not base our judgment on any such resemblances unless they receive support from the evidence of the the witnesses, particularly that of the Pandit. The identity of the handwriting in this case elucidates two matters, (*a*) the conscious possession, and (*b*) the criminal intent, of the appellant, and, in this connection, we may refer to two reported cases.

In *Barindra Kumar Ghose* v. *Emperor* (1), the learned Chief Justice observed:—"But to be an admission it is not necessary that a document should have been written by a person against whom it is sought to be used: it is sufficient if it be proved that the document has been in his possession, and that his conduct in reference to it has been such as to create an inference that he was aware of its contents and admitted their accuracy. Unless this

(1) (1909) I. L. R. 37 Calc. 467, 504.

1911

LALIT CHANDRA CHANDA CHOWDHURY v. EMPEROR.

be done, the document cannot be used as proof of its contents. What conduct would properly give rise to such an inference must necessarily depend on the circumstances of each case. Mere possession of letters would not ordinarily go for much, and the value of such possession must largely depend upon whether it can be shown that their contents have been recognized and adopted by the replies they may have elicited, or the conduct they may have inspired. If no such consequence can be traced, their value must necessarily be discounted."

In other words, as explained in *Wright* v. *Tatham* (1), the question is whether the person (here, the appellant) has in any manner *identified himself* with, or, in other words, has by any act, speech, or writing, manifested an acquaintance with and knowledge of the contents of all or any of these letters. The rule would apply more strongly where, as here, some of the papers and letters were received by, and others written by, the person against whom they are sought to be used.

The papers exhibited in this case may be considered in eight groups :—

(i) There is the label (Ex. III) on the canister containing the eleven bombs. The Pandit (witness No. 8) deposed that this paper is in the handwriting of the appellant. We accept his opinion, though we should hesitate to arrive at any independent conclusion in the matter on the comparison of handwritings we have made for ourselves. The writer of Ex. III intended to mislead anyone into whose hands the canister might fall. It was known to the appellant that his former schoolfellow, Amulya, whose name appears as the addressee on the label, was dead; yet he prefixed *sree* to his

(1) (1838) 5 Cl. & Fin. 670, 702.

name. Similarly, the mention of Dacca, as the place from which the person "Kamini" was sending the canister, was calculated to conceal the residence of the appellant at Munshigunge, in the event of the article being discovered on its way to some other destination.

(ii) The next group consists of the signatures of the appellant on his two books. These are admitted, and have been used for the purpose of comparison with his other alleged signatures in English.

(iii) We come now to the 29 post-cards and two letters on the wire-file and marked Ex. VIII-1 to VIII-31. All these are, admittedly, genuine, and, being for the most part communications to the appellant, they indicate that he was living in the *basha* where they were found. Exhibit VIII-5, however, is an application by the appellant for a post in the Tramway Company. Exhibit VIII-6 is a letter to one Monmohun Sutradhar which is couched in very guarded language and bears the construction that the appellant and his friends were engaged in some secret enterprise; thus, the writer says,—"I will shortly join the work of which I told you. See that you do not waver. Moreover, procure, if you can, a few articles for yourselves which you will carry in your own hands. The procession will be out on the 13th-14th." No attempt has been made to assign any innocent meaning to this mysterious missive, and its presence among the private correspondence of the appellant is significant of the life he was leading.

(iv) Then there are the six documents which were found under the mat of the *taktaposh*. Of these, Ex. XVII—XIX were written by the appellant, but not despatched. Ex. XIX betrays much anxiety and restlessness on the part of the writer: it is impossible that such a letter could have been manufactured for the purpose of implicating the appellant in the serious

1911

LALIT CHANDRA CHANDA CHOWDHURY v. EMPEROR.

offence for which he has been tried: it is a private letter on personal and domestic matters. The others, Ex. XVII and XVIII, are on the same lines as the six post-cards which witness No. 6 (the sub-postmaster of Kathadia Simulia) suspected and of which he kept a copy. This part of the case will be considered later on; but, here, it may be observed that if Ex. XVII and XVIII were forged, the six post-cards, also, which are missing, or, at any rate, one of them, might equally well have been prepared to bolster up the story of the sub-postmaster. There remain Ex. XX and XXI, which are mere schoolboy exercises: it would have been absurd and impracticable to manufacture such writings: also, Ex. XXII, a letter addressed to the appellant at Munshigunge: it refers to marriage as being full of responsibilities and reproaches him for his wandering habits. This paper also could not have been made up for the purposes of a criminal charge.

(v) Eight important papers were discovered in a fold of the *hogla* mat under which the six documents, already noticed, were found. They were in a packet, but not tied up. On Ex. IX were written some bomb formulæ, with a diagram. The eleven bombs were not of the description indicated in this paper, and the inference is that the appellant obtained the bombs from some one else working on a different system. The Pandit (witness No. 8) identifies the writing on Ex. IX as that of the appellant. Exhibit X is a simple cypher code, but it is not complete in the matter of vowels, and there is no evidence that it was ever used or could be effectively used. Exhibits XI—XIII are plans of houses which the Pandit cannot attribute to the appellant, but which are highly suspicious and have not been accounted for. It is a fair inference that the houses delineated were to be made the object of some attack. The next, Ex. XIV, is identified by the Pandit

as in the writing of the appellant: it contains a list of 13 names with the disposition of these persons when engaged in a dacoity. On the same paper is a seditious poem as to which the Pandit is certain that it was written by the appellant. This, also, could not have been made up for the purposes of a criminal case. The same remark applies, with greater force, to Ex. XV and XVI, which are post-cards addressed to the appellant. Their presence among the other papers is most significant: they are, no doubt, mysterious, and upbraid the appellant for being absent on an important occasion, but it would have been idle, if not impossible, to forge such writings to be introduced among the other papers.

(vi) Three post-cards from the appellant, Ex. XLII —XLIV, were found in the house of Jiban Krishna Bhadra, one of the names in Ex. XIV, the surname, Bhadra, being prefixed in the address on Ex. XLII. This peculiarity, also, appeared on the six post-cards spoken to by the sub-postmaster (No. 6) whose evidence we shall presently examine. Exhibit XLII contains instructions how to find the Munshigunge lodging of the appellant, which was evidently a kind of meeting place.

(vii) Two letters, Exhibits XLVI and XLVII, were found in the house of Ramani Mohan Ghose, another of the names in Exhibit XIV. In Exhibit XLVII the surname Ghose is prefixed as in Exhibit XLII. These letters were, admittedly, written by the appellant: in Exhibit XLVII the writer speaks of a great danger approaching.

(viii) The last group consists of two letters, Exhibits 7 and 8 (Exhibit VIII-17 being a reply), written by the appellant to the pleader Sailendra Chandra Banerjee, one of the search witnesses (No. 20) who produced them.

1911

LALIT CHANDRA CHANDA CHOWDHURY v. EMPEROR.

In our opinion the papers we have just examined satisfy the requirements explained in the reported cases to which we have alluded. The appellant has been shown to have *identified himself* with all the papers found at the house search of his premises. The argument based on the collocation of the various papers admits of no satisfactory answer in favour of the appellant. The contention on his behalf, that the incriminating papers were manufactured for the purposes of this prosecution, is untenable, and we have no hesitation in rejecting it as opposed to the evidence.

We proceed to consider the evidence of the sub-postmaster (witness No. 6) who has deposed that, on the morning of the 4th September, he received six post-cards addressed in the same hand, and in the same style, to certain persons, and inviting them to join the writer (signing himself as "Choudhuri") in some expedition. The witness says he made a copy (Exhibit XXXIV) of five of the post-cards and sent a copy of that copy to the Munshigunge thana through the village watchman. The paper said to have been so sent runs thus (Exhibit 6):—

"Five letters to the following effect addressed to the undermentioned persons have been distributed at Rautbhog. 1 Gopal Krishna Basu; 2 Manasha Charan Biswas; 3. Ramani Mohan Ghose; 4. Jiban Krishna Bhadra; 5. Bimala Charan Deb.

(Illegible)
5-9-1910
12 A. M

Munshigunge."

"I have told everything at the interview. I have fixed Monday next for our auspicious work. You will therefore oblige me by coming to my place before evening on that day and joining in the auspicious work and giving encouragement. To write to you in detail is but to waste time."

Yours,
Choudhuri."

It is manifest that Exhibits XVII and XVIII are to the same effect as the copy we have reproduced. The names of five out of the six addressees appear in Exhibit XIV (the disposition list for a dacoity). If the story told by the sub-postmaster be true, the appellant sent intimation to his associates to join him in the perpetration of some dacoity on the night of the 5th September 1910. Exhibits XVII and XVIII were never despatched. The former seems to be unduly detailed for a circular letter, but it would appear from its wording that the writer, the appellant, was not, by any means, certain that his friends would come when wanted. He beseeches Jiban Krishna Bhadra not to disappoint him and to bring others: he questions the strength of mind of his friends. The second letter, Exhibit XVIII, is much shorter, as follows:—

"My dear Ghose,—Do you remember what I said to you? The day fixed for that work is Monday next. Come just before dusk. Don't forget.

Yours,
Choudhuri."

It may be argued that Ex. XVIII was a draft of which the police took advantage and concocted the story of the six post-cards; but, if so, why was not at least one post-card produced and supported by the testimony of the sub-postmaster who, on this hypothesis, was in league with the police. If wholesale forgeries were being committed, one more would not have made any difference. The absence of the appellant at the moment when the search was begun may be accounted for by his going to meet the friends he expected at Katakhali (see Ex. XVII). The slipshod procedure of the sub-postmaster in communicating the intelligence to the police may be explained by his being a postal official bound neither by rule nor inclination to assist the police. His attitude

1911

LALIT CHANDRA CHANDA CHOWDHURY v. EMPEROR.

was one of benevolent neutrality. The six post-cards were not in themselves seditious: the sub-postmaster was obliged to deliver them to the addressees. We have read his evidence carefully: it bears the impress of truth.

Among the letters we have mentioned, two were written by the appellant to the search witness (No. 20) Sailendra Chandra Banerjee (Ex. 7 and 8), and one, Ex. VIII—17, was a reply to the appellant. Upon these and the evidence of Sailendra Babu is founded the argument which appears to have chiefly weighed with the Assessors. There is no doubt that Sailendra Babu was a good friend to the appellant who, after a disagreement with the Head Master of the Rautbhog school, wished to enter the first class of the school owned by Sailendra Babu and went so far as to promise to get other boys to join the latter establishment. Sailendra Babu answered diplomatically (Ex. VIII—17). The appellant, however, did not succeed in entering the school of his desire. Sailendra Babu had reason to suspect the loyalty of the appellant, and he warned him that his lodgings might be searched and advised him to leave Munshigunge at once. But, in point of fact, the appellant did not go away, though he was traced to Dacca (page 408), on or about the 27th August, a week before the search took place. Nothing is more natural than to suppose that the appellant was acting under orders, and that he had brought the box, with the canister of the eleven bombs, from Dacca, a day or two before the 5th September. The box was temporarily in the lodging of the appellant. The bombs were of a different formula and not of the kind which would have been prepared in accordance with the directions in Ex. IX. The appellant, though watched, was not being "shadowed." From the information received, the police had reason to believe

that bombs and suspicious papers would be discovered: hence the search. The contention that the appellant would not have dared, or found opportunity, to conduct his operations from a house close to the Munshigunge police station is not conclusive, for, in the case of *Barindra Kumar Ghose* v. *Emperor* (1), the accused had their centres in the town and suburbs of Calcutta, and it should be borne in mind that the premises of the appellant were situated in the quarters inhabited by respectable persons and resorted to by *bonâ fide* students. The vernacular saying is proverbial that "it is always darkest under the lamp." After the most anxious consideration, we have come to the conclusion that the argument of improbability which influenced the Assessors is not sound. Their other reasons have been considered in the course of this judgment.

From all that we have said, it follows that this appeal must be dismissed. The conviction and sentence are affirmed.

E. H. M.

Appeal dismissed.

(1) (1909) I. L. R. 37 Calc. 467.

LETTERS PATENT APPEAL.

Before Sir Lawrence H. Jenkins, K.C.I.E., Chief Justice, and Mr. Justice D. Chatterjee.

1911

Aug. 25.

AFAZUDDI KHAN

v.

PRASANNA GAIN.*

Landlord and Tenant—"Protected interests"—Incumbrance—Bengal Tenancy Act (VIII of 1885), s. 160 (g).

The plaintiffs held under a sub-lease granted by G, who held under a permanent lease granted by B, B again holding under a permanent lease granted by P. The lease given by P to B authorized B to grant sub-leases.

Held, that the right and interest of G, and therefore of the plaintiffs, are "protected interests" and are not such as can be interfered with by a purchaser under the Bengal Tenancy Act.

APPEAL under section 15 of the Letters Patent by Afazuddi Khan, the plaintiff No. 3, from a judgment of Doss J.

The appeal arose out of a suit for *khas* possession after establishment of occupancy right.

Under the Saidpur Trust Estate, Prasanna Kumar Mitra and others held a permanent *ganti* tenure. Under the *gantidars*, Brojendra Kumar Sen had a *darganti*. Under the holder of the *darganti*, Ganesh Chandra Chatterji and others had a *darmaurusi kayemi ganti*. Under them the plaintiffs owned the holding in suit. In execution of a decree obtained by Prasanna against Brojendra for arrears of rent due in respect of the *darganti* tenure, the latter was sold and purchased by the defendant No. 4, who thereupon served a notice under section 167 of the Bengal Tenancy Act on

* Letters Patent Appeal No. 48 of 1910, in Appeal from Appellate Decree No. 1766 of 1908.

Ganesh and others for annulling their *darmaurusi kayemi ganti*, and also upon the plaintiffs for annulling their *raiyati* holding. The notice, however, did not contain the name of one of the plaintiffs, viz., plaintiff No. 3. The plaintiffs brought the present suit for recovery of possession against the defendant No. 1, who was in possession of the holding under a verbal settlement from the defendant No. 4, the auction-purchaser.

Both the Courts below gave a decree to the plaintiffs on the ground that the non-occupancy holding of the plaintiffs had not been annulled by any valid notice. On second appeal to the High Court, Doss J., being of opinion that the Courts below were right on this point, held that no notice was necessary to be served on the plaintiffs, as the interest of the plaintiffs could not, in the view he took of the case, be said to be a "protected interest." The appeal was thus decreed by Doss J., and the suit of the plaintiffs was dismissed. Thereupon, the plaintiff No. 3 preferred the present appeal.

Babu Mahendranath Roy and *Babu Hiralal Chakrabarti*, for the appellant.

Babu Mohini Mohan Chatterji, for the respondent.

D. CHATTERJEE J. The only question that arises for decision in this case is whether the position of the plaintiffs was that of tenants whose rights may be classed as "protected interests" within the meaning of section 159 of the Bengal Tenancy Act. The plaintiffs held under a sub-lease granted by Ganesh Chandra Chatterjee and others, who held under a permanent lease granted by Brojendra Kumar Sen, Brojendra Kumar Sen again holding under a permanent lease granted by Prasanna Kumar Mitra and

1911

AFAZUDDI KHAN v. PRASANNA GAIN.

CHATTERJEE J.

others. It is contended that the lease given by Prasanna Kumar Mitra and others to Brojendra Kumar Sen authorized Brojendra Kumar to grant sub-leases, and as the sub-lease granted by Ganesh Chatterjee and brothers was a sub-lease, and as it was therefore within the authority granted by the lease given to Brojendra Kumar Sen, it was a "protected interest" within clause (*g*) of that section. The words of the lease are that the lessee Brojendra Kumar Sen was to enjoy the property by making *projabili, etc.*, that is, by settling tenants and otherwise. Admittedly Brojendra Kumar Sen settled Ganesh Chandra Chatterjee and others upon the land as sub-lessees under him. The right and interest of Ganesh Chandra Chatterjee was therefore granted by Brojendra Kumar Sen under the authority received by him from Prasanna Kumar Mitra. That being so, the right and interest of Ganesh Chatterjee and therefore of the plaintiffs do not appear to be such as can be interfered with by a purchaser under the Bengal Tenancy Act. The defendants Nos. 4 to 6, therefore, were not entitled to evict the plaintiffs.

The decree of the lower Appellate Court, therefore must be restored with costs.

JENKINS C.J. I agree with the conclusion of Mr. Justice Chatterjee. The case appears to me to turn upon the precise force to be attributed to the Bengali words set out in the judgment of the learned Munsif. My learned colleague, who is eminently qualified to express an opinion as to that, has come to the conclusion that the words contained in the lease from the Mitters to Brojendra Kumar Sen amounted to an express permission in writing to create the interest, which in fact was created in favour of Gonesh Chandra Chatterjee. This is not

only the view of Mr. Justice Chatterjee, but also the view of the Munsif who had fully considered the precise force of the Bengali words; and accepting, as I do, the interpretation placed on these words, the conclusion which my learned colleague has expressed is the only one at which it is possible to arrive. I agree with him that the judgment of Mr. Justice Doss must be set aside, and the decree of the lower Appellate Court confirming that of the Munsif affirmed with costs, including all the costs of the High Court.

S. M.

Appeal allowed.

LETTERS PATENT APPEAL.

Before Sir Lawrence H. Jenkins, K.C.I.E., Chief Justice, and Mr. Justice D. Chatterjee.

DEB NARAIN DUTT

v.

CHAIRMAN OF THE BARUIPUR MUNICIPALITY.*

1911

Aug. 29.

Municipal assessment—Principle of assessment—Valuation of property, basis of—Appeal-Committee—Bengal Municipal Act (Beng. III of 1884), ss. 85, 114.

In assessing tax upon persons under clause (*a*) of s. 85 of the Bengal Municipal Act, both the "circumstances" and the "property" referred to in the section must be within the municipality in question.

S. 114 of the Bengal Municipal Act does not lay down that application shall be heard and determined by all the Commissioners appointed as members of the Appeal-Committee.

* Letters Patent Appeal No. 45 of 1910, in appeal from Appellate Decree, No. 1581 of 1908.

1911

DEB NARAIN DUTT v. CHAIRMAN OF THE BARUIPUR MUNICIPALITY.

APPEAL under section 15 of the Letters Patent by the plaintiff, from a judgment of Doss J.

This was a suit for a declaration that the Baruipur Municipal assessment of 1906-07 was illegal and arbitrary, and as such not binding on the plaintiff. The principal allegations of the plaintiff, so far as they were material for this appeal, were that he was a rate-payer of the Baruipur Municipality and had to pay two kinds of taxes, namely, a tax on person and the latrine-tax; that before 1906, the plaintiff's tax on person had been Rs. 30-9 and latrine-tax Rs. 16-4; that in the last assessment after the plaintiff's objection on review had been determined, his tax on person was raised to Rs. 37-8 and his latrine-tax to Rs. 21; that the aforesaid assessment and valuation were illegal and arbitrary; that the assessment was made against the provisions of law and based on the entire income of the plaintiff, including property lying outside the limits of the municipality; and that the order passed by the Appeal-Committee on his application for the review of the assessment was illegal, because one of the Commissioners constituting the Appeal-Committee was absent when his case was heard and determined.

The Munsif's findings on the abovementioned points were in favour of the plaintiff, and the suit was accordingly decreed with costs by him.

On appeal, the District Judge reversed the judgment of the Munsif and allowed the appeal. The second appeal was heard by Doss J. sitting singly. His Lordship agreed with the District Judge and dismissed the appeal. The plaintiff thereupon preferred this Letters Patent Appeal.

Babu Shib Chandra Palit, for the appellant. The word 'circumstance' in section 85 cannot mean

'income' or 'mode of living.' The word has not been defined. But the meaning of the Legislature is clear from section 92, where the word is 'means.' This is also the meaning of the word to be found in dictionaries: see also *Chairman of Giridih Municipality* v. *Srish Chandra Mozumdar* (1), per Mookerjee J.

I cannot be taxed on my expenditure nor on income outside the municipality. If that is done, I am likely to be taxed twice. The Judge has come to a contrary conclusion without reversing the findings of the Munsif. He has come to no finding really. The Judge has, moreover, relied on the opinion of the Legal Remembrancer, which he had no business to do: see also the case of *Kameshwar Pershad* v. *Chairman of the Bhabua Municipality*. (2)

As regards the Appeal-Committee, the minimum number is no doubt three as mentioned in section 114. But if four are appointed, all four must sit. As for me, I have no choice of tribunal.

Babu Mahendra Nath Roy (with him *Babu Baranasheebashee Mukherji*), for the respondents. In *Chairman of Giridih Municipality* v. *Srish Chandra Mozumdar* (1), Stephen J. gives a broader meaning to the word 'circumstance,' and I contend that the manner of living is an important element in assessment.

JENKINS C. J. In my opinion the judgment of the District Judge cannot be accepted, and as a result we are unable to confirm his decree, though Mr. Justice Doss was in agreement with it. The question that arises is one of considerable importance

(1) (1908) I. L. R. 35 Calc. 859. (2) (1900) I. L. R. 27 Calc. 849, 858.

1911

DEB NARAIN DUTT v. CHAIRMAN OF THE BARUIPUR MUNICIPALITY.

JENKINS C.J.

to the plaintiff, who has brought this suit for a declaration that the Baruipur Municipal assessment of 1906-07 is illegal and arbitrary and as such not binding on him. Now, that assessment purported to be under section 85 of the Bengal Municipal Act of 1884, which provides that "the Commissioners may, from time to time, at a meeting convened expressly for the purpose, of which due notice shall have been given, and with the sanction of the Local Government impose within the limits of the municipality, ...

(*a*) A tax upon persons occupying holdings within the municipality according to their circumstances and property within the municipality."

The Munsif in a very careful judgment came to the conclusion that the plaintiff was entitled to succeed in this suit. In the course of his judgment he says that "It can be gleaned from the deposition of the plaintiff himself and his witness, Hridoy Nath Dutt, that the total income of the plaintiff's property situate within and outside the municipality is Rs. 3,000, and his income from property, situate within the municipality, is Rs. 100 per year, besides a holding of Rs. 300 a year. The plaintiff has been assessed at Rs. 6,000 by the assessor. There is no evidence on the defendant's side to rebut the plaintiff's statement as regards his income within the municipality. Thus it is quite evident that the plaintiff's entire income was taken into consideration by the assessor."

The learned District Judge set aside this decree, but he came to no finding of fact as to whether the assessment was according to the 'circumstances and property' of the plaintiff 'within the municipality'; and in the absence of any such finding his judgment is manifestly incomplete.

We must, therefore, send down the following issues for determination: (i) what were the circumstances

and property within the municipality according to which the tax was imposed upon the plaintiff; and (ii) what is the value of such several circumstances and property. I would point out that, according to the words of the Act and according to the ruling of this Court, both the circumstances and the property must be within the municipality. The above issues must be determined on the record as it at present stands and the return must be made within three months.

The learned District Judge appears to have accepted the opinion of the Legal Remembrancer as a correct exposition of the law. I do not agree with this view of the law, and, indeed, it has been conceded before us that it would be difficult to support all that the Legal Remembrancer has said.

I do not agree that there was no proper tribunal to hear assessment appeals; I think that the three Commissioners were a competent tribunal.

D. CHATTERJEE J. I agree.

S. M.

CIVIL RULE.

Before Mr. Justice Woodroffe and Mr. Justice Teunon.

1911

Sept. 5.

ABDUL KARIM ABU AHMED KHAN

v.

ABDUS SOBHAN CHOWDHRY.*

Transfer—Notification by Local Government, empowering a particular Judge to deal with a part-heard case pending in another Court, how far legal—Civil Procedure Code (Act V of 1908), s. 92—Power of District Judge to transfer a case from his file, by virtue of such notification.

A notification by the Local Government, under section 92 of the Civil Procedure Code (Act V of 1908), directed to a particular Judge and purporting to deal with a particular litigation, which was already pending in the Court of the District Judge, is *ultra vires*.

A District Judge, therefore, has no power to transfer a case brought under section 92 of the Civil Procedure Code, which was pending in his Court, to the Court of a particular Subordinate Judge, who was empowered by Local Government to try it, by virtue of such a notification.

RULE obtained on behalf of the petitioners, Abdul Karim Abu Ahmed Khan and others.

The plaintiffs, Nawab Abdus Sobhan Chowdhry and others, instituted a suit under section 92 of the Civil Procedure Code in the Court of the District Judge of Mymensingh against one Abdul Karim Abu Ahmed Khan. The learned District Judge, having decided some preliminary issues in the case, asked the Local Government, by a letter, to empower Babu Behari Lal Chatterjee, Subordinate Judge, to try the suit. The Local Government informed the District Judge to forward his letter through the Hon'ble High

* Civil Rule No. 4784 of 1911, against the order passed by Behari Lal Chatterjee, Subordinate Judge of Mymensingh, dated Aug. 15, 1911.

Court, which being done, the following notification was issued :—

"No. 1110J.—Babu Behari Lal Chatterjee, Subordinate Judge of Mymensingh, is empowered, under section 92 of the Code of Civil Procedure, to try or dispose of suit No. 1 of 1910, Nawab Abdus Sobhan Chowdhry and others, plaintiffs, *v.* the Hon'ble Mr. Abdul Karim Abu Ahmed Ghaznavi and others, defendants, pending in the Court of the District Judge of Mymensingh."

By virtue of this notification the learned District Judge, by his order dated the 18th July 1911, transferred the case from his file to that of Babu Behari Lal Chatterjee, Subordinate Judge, before whom an objection was taken that the District Judge had no power to transfer the case to the Subordinate Judge, and that the Subordinate Judge had no jurisdiction to try it. The learned Subordinate Judge overruled the objection.

Against that order the defendants moved the High Court and obtained this Rule.

Dr. Rash Behary Ghose (with him *Babu Akhilbandhu Guha*), for the petitioners. The notification of the Local Government empowering a particular Judge to try a case under section 92 of the Civil Procedure Code is *ultra vires*. The suit was instituted in the Court of the District Judge, being the principal civil court of original jurisdiction in the district, and it was partly heard by the learned Judge. Section 92 says that the Local Government may empower any other Court, which clearly means a Court of competent jurisdiction and not any particular Judge. The suit was pending in the Court of the District Judge, and the power given to the particular Judge to try a part-heard case was illegal. The notification being *ultra vires*, the District Judge's power to transfer the case from his file to that of the Court of Babu Behari Lal Chatterjee, Subordinate Judge, was also *ultra vires*.

1911

ABDUL KARIM ABU AHMED KHAN v. ABDUS SOBHAN CHOWDHRY.

Mr. B. Chakravarti (with him *Babu Umesh Chunder Ghose* and *Babu Nares Chunder Sen Gupta*), for the opposite party. If the Local Government can authorize a Court to try all suits of alleged breach of trust, is there anything to prevent it to authorize a particular Judge to try a suit of that nature? I submit there is nothing in section 92 of the Civil Procedure Code which prevents it. The suit was properly instituted in the Court of the District Judge, and, under section 24 of the Code, he had the power to transfer a case at any stage. If the Local Government in the notification had said that the 3rd Subordinate Judge was authorized to try all suits concerning trusts and the District Judge then transferred the case from his file to that of the Subordinate Judge thus authorized, there could have been no objection to the transfer. There is no substance in the contention raised by the other side.

WOODROFFE and TEUNON JJ. This Rule must, I think, be made absolute, because the notification of the 4th July 1911 was not such a notification as was contemplated by section 92 of the Code of Civil Procedure. It was a notification directed to a particular Judge and purported to deal with a particular litigation; and that litigation was, at the date of the notification, already pending in the Court of the District Judge. It follows that the Subordinate Judge of Mymensingh was not competent to try or dispose of the suit; and the District Judge had no power to transfer the suit to a Court which was not then competent to dispose of it. In, however, making the Rule absolute we desire to make it clear, in order to avoid any possible objection in future, that the District Judge has, notwithstanding anything that has hitherto been done, power to try

this suit. The result of our holding that the Subordinate Judge was not competent to try the suit is that the District Judge effected nothing by his order of transfer, and, therefore, the suit remained where it was originally instituted. The District Judge, therefore, has jurisdiction to try the suit; and we think, having regard to the circumstances of the case and also to the waste of time that has been involved by reason of the infructuous proceedings in the court of the Subordinate Judge, that this case should be heard as soon as possible, that is to say, as soon as the Judge can conveniently hear it.

We may also say, having regard to the statements made to us, that if there is pressure of work in the Judge's Court, an application may properly be made by him for assistance in carrying on his work as District and Sessions Judge.

In the circumstances of the case, the Rule is made absolute, without costs.

Let the record and this order be sent down at once.

S. C. G. *Rule absolute.*

FULL BENCH.

Before Sir Lawrence H. Jenkins, K.C.I.E., Chief Justice, Mr. Justice Woodroffe, Mr. Justice Mookerjee, Mr. Justice Carnduff and Mr. Justice D. Chatterjee.

1911

Sept. 5.

EMPEROR

v.

ABBAS.*

Dispute concerning land—Likelihood of breach of the peace—Jurisdiction of Magistrates—Criminal Procedure Code (V of 1898), ss. 107, 145.

There is no conflict between ss. 107 and 145 of the Criminal Procedure Code.

The fact that there is a dispute concerning land, likely to cause a breach of the peace, does not deprive a Magistrate of jurisdiction under s. 107 of the Criminal Procedure Code, where he is informed that any person is likely to commit a breach of the peace or disturb public tranquillity, or to do any wrongful act that may probably occasion a breach of the peace or disturb the public tranquillity.

Whether, after proceeding under s. 107 of the Criminal Procedure Code, it will be proper for a Magistrate to act under s. 145 of the Code must depend on the circumstances of each case as it arises, *viz.*,whether likelihood of a breach of the peace continues or not.

The competence of the Magistrate to proceed under s. 107 of the Code against persons not in possession, must depend upon whether as against those persons the conditions specified in the section have been established.

THE "Reference" to Full Bench, by Caspersz and Ryves JJ., was in the following terms :—

"This is a rule calling upon the District Magistrate of Dacca to show cause why the order of the Deputy Magistrate, dated the 23rd September, 1908, binding down the petitioners to keep the peace, which order was confirmed by the Additional District Magistrate on the 24th November, 1908, should not be set aside in accordance with the principles laid down in the case of *Balajit Singh* v. *Bhoju Ghose* (1).

* Reference to a Full Bench in Criminal Revision No. 198 of 1909.

(1) (1907) I. L. R. 35 Calc. 117.

"The petitioners are the members of the second party in a certain dispute for land, and the finding of both the Lower Courts is that the land is in the possession of the first party, and, in this view of the matter, the petitioners have been bound down to keep the peace.

"The Additional District Magistrate observes: 'The petitioners' contention that section 107, Criminal Procedure Code, was inapplicable, as the subject-matter of the dispute was land, is of weight; no doubt, the matter could have been more satisfactorily settled by proceedings under section 145, Criminal Procedure Code, but the Lower Court was in no way acting improperly in taking proceedings under section 107, Criminal Procedure Code. The only important ground of objection is the question whether the evidence before the Lower Court was sufficient to justify the order complained against.'

"On these facts we think that, if the case cited in the Rule [*Balajit Singh* v. *Bhoju Ghose* (1)] was correctly decided, the order under section 107, Criminal Procedure Code, cannot be sustained. In that case there was a dispute relating to the possession of a *jalkar*, and the Magistrate passed an order directing Balajit Singh and others of the second party to execute bonds to keep the peace. Those persons moved the District Magistrate, but he refused to interfere. Thereupon a Rule was obtained from this Court, and the matter was argued by learned counsels on both sides. The learned Judges (Mitra and Fletcher JJ.) relying upon an earlier decision, in the case of *Dolegobind Chowdhry* v. *Dhanu Khan* (2), set aside the order binding down the second party. They observed as follows:—

'Looking to the words used in section 107 and in section 145, we have no doubt that the proper course for the Magistrate in a case like this was to proceed under section 145 of the Code. The words in section 145 are mandatory. The section says—

Whenever a Magistrate of the District . . . is satisfied, from a police report or other information, that a dispute likely to cause a breach of the peace exists concerning any land or water . . . he *shall* make an order in writing, etc., etc.

Section 107 contains words which are discretionary,—the Magistrate *may* institute proceedings binding down either of the parties.'

In that view of the matter the Court set aside the order under section 107, Criminal Procedure Code, and left it to the Magistrate, if he thought it necessary, that is to say, if there was still a likelihood of a breach of the peace, to draw up proceedings under section 145 of the Code.

"It will be observed that Mitra and Fletcher JJ. did not refer to any of the other cases cited by the learned counsel in the course of their arguments. These we proceed to notice.

(1) (1907) I. L. R. 35 Calc. 117. (2) (1897) I. L. R. 25 Calc. 559

1911

EMPEROR v. ABBAS.

"In *Sheoraj Roy* v. *Chatter Roy* (1), Rampini and Mookerjee JJ. held that 'where a dispute relating to possession of land is likely to cause a breach of the peace, a Magistrate has a discretion to proceed either under section 107 or under sections 144 and 145 of the Criminal Procedure Code.' A similar view had been adopted in the case of *In the matter of the petition of Ekram Singh*(2). There Mr. Justice Prinsep, in delivering the judgment of the Court, observed—'We find ourselves unable to pass any order on this application, because we are not competent to direct proceedings to be taken under section 145, and this is the object that the petitioner has in view.' And the learned Judge agreed with the District Magistrate that the case was not a case for section 145, Criminal Procedure Code, only, and that where both parties contemplate a breach of the peace, it may be necessary to bind them both down. On the other hand, the same learned Judge, sitting with Mr. Justice Wilkins, and the case of *Bejoy Singha Neogi* v. *Empress* (3), set aside an order requiring security from the parties to a dispute for land, and expressed the opinion that the proper course for the Magistrate to have taken was to have instituted proceedings under section 145.

"In the next case, that relied upon by Mitra and Fletcher JJ. in the case of *Balajit Singh* v. *Bhoju Ghose* (4), we mean, the case of *Dolegobind Chowdhry* v. *Dhanu Khan* (5), the *ratio decidendi* was that the order under section 107 had the evident effect of binding down only one of the parties to the dispute, leaving the other party free without any adjudication upon the question as to which of the parties was in possession. It does not appear whether, in the case of *Balajit Singh* v. *Bhoju Ghose* (4), there had been any adjudication as to the possession of the *jalkar*, and whether that adjudication was in favour of the first party who were *not* bound down under section 107. But it would appear that the rights of the respective parties to the *jalkar* had been gone into on the basis of the numerous documents filed. If we are correct in this surmise, the case of *Dolegobind Chowdhry* v. *Dhanu Khan* (5) is not an authority for the proposition enunciated in the case of *Balajit Singh* v. *Bhoju Ghose* (4).

"The next case is that of *Bidhu Bhusan Chatterji* v. *Annoda Churn Kanangui* (6), which also follows the case of *Dolegobind Chowdhry* v. *Dhanu Khan* (5). But we observe that here also the question of possession was gone into by the Magistrate and was decided against the second party who were accordingly bound down under section 107, Criminal Procedure Code.

(1) (1905) I. L. R. 32 Calc. 966.
(2) (1899) 3 C. W. N. 297.
(3) (1899) 3 C. W. N. 463.
(4) (1907) I. L. R. 35 Calc. 117.
(5) (1897) I. L. R. 25 Calc. 559.
(6) (1902) 6 C. W. N. 883.

"In *Balai Mahto* v. *Nobin Manjhi* (1), Stevens and Harington JJ., without referring to any of the authorities, held, on general principles, that when 'the apprehension of a breach of the peace was contingent upon the attempt on either side to exercise acts of possession in the disputed land, that would have been very good ground for establishing possession of one party or the other.' Consequently the order binding down both the parties to keep the peace was set aside, though the Magistrate was given liberty to take fresh proceedings according to law.

"The next case to which we shall refer is *King-Emperor* v. *Basiruddin Mollah* (2), which was referred to by Mr. Justice Fletcher in the course of the arguments in *Balajit Singh* v. *Bhoju Ghose* (3). There was a difference of opinion between the learned Judges in that case and the judgment of Mr. Justice Banerjee, the 3rd Judge, who agreed with Mr. Justice Harington, was to the following effect :—'After going through the papers, I am of opinion that, although the mere fact of a dispute likely to lead to a breach of the peace being a dispute relating to the possession of land may not be sufficient to preclude the Magistrate from taking proceedings under section 107 of the Code of Criminal Procedure, and to continue his action to a proceeding under section 145, yet, having regard to the facts found by the Deputy Magistrate in this case, it cannot be said that a case sufficient for the taking of security under section 107 has been established. In the opinion of Mr. Justice Brett, on the point of law with which we are now dealing, the Magistrate is not deprived of jurisdiction under section 107, Criminal Procedure Code, in a case in which a dispute is likely to cause a breach of the peace relating to land..

"The learned Judges in *Balajit Singh* v. *Bhoju Ghose* (3) relied on the wording of the two sections 145 and 107; but, with the greatest respect for their opinion, we are unable to appreciate the destinction that they draw. Section 145 is so far mandatory that, when a Magistrate is satisfied that a dispute likely to cause a breach of the peace exists concerning any land, he *shall* make an order in writing. That describes the procedure he must invariably adopt; but, in our opinion, it does not lay down any hard-and-fast rule that, when he is so satisfied, he must take action under the one section and not under the other.

"In this conclusion, we are supported by the case of *Sheoraj Roy* v. *Chatter Roy* (4), where the learned Judges (Rampini and Mookerjee JJ.) pointed out that the case of *King-Emperor* v. *Basiruddin Mollah* (2) had practically overruled the case of *Saroda Prosad Singh* v. *Emperor* (5).

(1) (1902) 7 C. W. N. 29.
(2) (1903) 7 C. W. N. 746.
(3) (1907) I. L. R. 35 Calc. 117.
(4) (1905) I. L. R. 32 Calc. 966.
(5) (1902) 7 C. W. N. 142.

1911

EMPEROR v. ABBAS.

"Considerable difficulty would arise if it were held that the proceedings must of necessity be taken under section 145 where the dispute concerns land. This may be inferred from the circumstances mentioned in the case of *Makham Lal Roy* v. *Barada Kanta Roy* (1). It was there said that 'proceedings under section 145, Criminal Procedure Code, cannot be instituted with respect to a dispute between two parties having joint rights to the land in dispute, each claiming exclusive posssession thereof;' and it was held that, in such a case, the proper procedure was to bind down both the parties under section 107, Criminal Procedure Code. But if the decision in *Balajit Singh* v. *Bhoju Ghose*(2) is good law, then the order passed in the case of *Makham Lal Roy* v. *Barada Kanta Roy* (1) is clearly wrong, because section 107, Criminal Procedure Code, has no application where a dispute likely to cause a breach of the peace is likely to arise out of the holding of land.

"We do not think that the Legislature intended to deprive a Magistrate of all power to bind down the parties, or one of them, to keep the peace in regard to those numerous land disputes where the parties are likely to fight over possession or the incidents of land in which they have joint interests.

"Upon a review of the authorities, we are unable to follow the case of *Balajit Singh* v *Bhoju Ghose* (2), and in the conflict of decisions, we think it necessary, and this course will also be very convenient for the guidance of the mofussil officers, to refer the questions involved to a Full Bench of this Court.

"The three points upon which we would invite the opinion of the Full Bench are :—

"*First*, if there is a dispute likely to cause a breach of the peace concerning land, is the Magistrate bound to take action under section 145, Criminal Procedure Code, or is he at liberty to proceed under section 107, either exclusively or in addition to proceedings under section 145 ;

"*Secondly*, in the circumstances mentioned, is it competent to the Magistrate, in taking action under section 107, Criminal Procedure Code, only, to bind down the members of that party which, upon a summary adjudication as to possession, he finds are *not* in possession of the subject of dispute ; and

"*Thirdly*, was the case of *Balajit Singh* v. *Bhoju Ghose* (2) correctly decided ?

["Notice will be issued to the opposite party in this Rule before the hearing of the Reference.]"

Babu Harendra Narayan Mitra, for the accused. I shall only contend that section 145 would only

(1) (1906) 11 C. W. N. 512. (2) (1907) I. L. R. 35 Calc. 117.

apply if the dispute is as regards land and land only. Part IV of the Code deals with the prevention of offences, and Part VI deals with the procedure for bringing offenders to justice. Part IV is divided into six Chapters,—all dealing with preventive measures. The intention of the Legislature with reference to disputes as to land is clear: see Regulation XLIX of 1793, preamble. The authority for enforcing peace is given to civil officers. Regulation XV of 1824 transferred the right to Magistrates. The subsequent Acts make it plain that in a matter like this, where the main question is as regards possession of land, the intention is only to prevent dispute by putting one person in possession. The word "shall" in section 145 of the Code of 1898 shows clearly the intention of the Legislature. The intention of the Legislature was plainly not to make section 107 applicable in land disputes. The word "wrongful" was wanting in the old Acts in the section corresponding to section 107 of the present Code. This was added after the decision in *Kashi Chunder Dass* v. *Hurkishore Dass* (1); I take it 'wrongful' means 'unlawful.'

The result of proceeding under section 107 is in some cases to bind down the man who was actually in possession and has been dispossessed very recently and wrongfully. Action under section 145 is the safer and more appropriate. That is the opinion of a large number of Judges in this Court.

[JENKINS C.J. What is the use of going over cases where the section is clear?]

There are some cases which are not mentioned in the Order of Reference. Some cases cited are distinguishable or inapplicable. I shall cite all cases on the point in chronological order without comments:

(1) (1873) 19 W. R. Cr. 47.

1911

EMPEROR v. ABBAS

Queen v. *Mohesh Chandra Roy* (1), *Driver* v. *Queen-Empress* (2), *Saroda Prosad Singh* v. *Emperor* (3), *Emperor* v. *Debendra Nath Bose* (4), *Jafar Mandol* v. *Jaribullah Saha* (5), and *Baisnab Das Babaji* v. *Emperor* (6). The Madras and Allahabad cases are: *Belagal Ramacharlu* v. *Emperor* (7), *Mahadeo Kunwar* v. *Bisu* (8), *Emperor* v. *Ram Baran Singh* (9), *Debi Prasad* v. *Sheodat Rai* (10).

Lastly, there is the practical inconvenience of applying section 107.

Cur. adv. vult.

The judgment of the Court (JENKINS C.J., WOODROFFE, MOOKERJEE, CARNDUFF and D. CHATTERJEE JJ.) was as follows:—

There is in our opinion no conflict between sections 107 and 145 of the Criminal Procedure Code, so that the fact that there is a dispute concerning land, likely to cause a breach of the peace, does not deprive a Magistrate of jurisdiction under section 107 of the Criminal Procedure Code, where he is informed that any person is likely to commit a breach of the peace or disturb the public tranquillity, or to do any wrongful act that may probably occasion a breach of the peace or disturb the public tranquillity.

Whether, after proceeding under section 107 of the Criminal Procedure Code, it will be proper for a Magistrate to act under section 145 of the Criminal Procedure Code, must depend on the circumstances of each case as it arises. It may be that after an order under section 107 no likelihood of a breach of the peace would continue.

(1) (1875) 24 W. R. Cr. 67.
(2) (1898) I. L. R., 25 Calc., 798.
(3) (1902) 7 C. W. N. 142.
(4) (1904) 1 C. L. J. 632.
(5) (1905) 9 C. W. N. 551.
(6) (1908) 12 C. W. N. 606.
(7) (1902) I. L. R. 26 Mad. 471.
(8) (1903) I. L. R. 25 All. 537.
(9) (1906) I. L. R. 28 All. 406.
(10) (1907) I. L. R. 30 All. 41.

The competence of the Magistrate to proceed under section 107 of the Criminal Procedure Code against persons not in possession must depend upon whether as against those persons the conditions specified in the section have been established.

S. M.

FULL BENCH.

Before Sir Lawrence H. Jenkins, K.C.I.E., Chief Justice, Mr. Justice Woodroffe, Mr. Justice Mookerjee, Mr. Justice Carnduff and Mr. Justice D. Chatterjee.

MEHI SINGH

v.

MANGAL KHANDU.*

1911

Sept. 6.

Compensation—Appellate Court, power of—Criminal Procedure Code (V of 1898), s. 250—Consequential or incidental order.

An Appellate Court has no power to order compensation under section 250 of the Criminal Procedure Code.

The Reference to Full Bench by Stephen and Carnduff JJ. was in the following terms :—

"The petitioner before us lodged a complaint under sections 379 and $\frac{379}{114}$ of the Indian Penal Code against three persons, who were convicted before a Deputy Magistrate. On appeal to a Joint Magistrate the convictions were set aside, and the Appellate Court found the case entirely false and called on the petitioner to show cause why he should not pay Rs. 25 as compensation to each of the appellants under section 250 of the Criminal Procedure Code. No cause being shown, the order to pay compensation was made absolute. A motion to set aside this order was rejected by the District Magistrate. We have issued a Rule to show cause why the order for compensation should not be set aside on the ground that the Court had no jurisdiction to make an order on appeal granting compensation.

"The question we wish to refer is,—'Has an Appellate Court power to order compensation under section 250 of the Criminal Procedure Code ?'

* Reference to a Full Bench in Criminal Revision No. 1433 of 1909.

1911

MEHI SINGH v. MANGAL KHANDU.

"The question turns on the construction of sections 250 and 423 of the Code. The former, as far as it is relevant, runs as follows :—

'If in any case instituted by complaint . . . or upon information given to a police-officer or to a Magistrate, a person is accused before a Magistrate of any offence triable by a Magistrate, and the Magistrate by whom the case is heard discharges or acquits the accused and is satisfied that the accusation against him was frivolous or vexatious, the Magistrate may, in his discretion, . . . direct the complainant to pay compensation to the accused.'

But, before making such direction 'the Magistrate' is to '(*a*) record and consider any objection which the complainant may urge;' and (*b*) if he 'directs' 'compensation' 'state in writing, in his order of discharge or acquittal, his reasons for awarding'; and by sub-section (*3*), a complainant who has been ordered by a Magistrate of the second or third class to pay compensation, may appeal from that order as if he had been convicted on a trial held by such Magistrate. On the terms of this section there can be no doubt that the only person who has power to award compensation under it is the Magistrate by whom the case is heard. But it is contended that this power is conferred on the Appellate Court by section 423(*1*) (*d*) of the Code. This section enables an Appellate Court to take certain steps in cases of (*a*) acquittals, (*b*) convictions, and (*c*) other orders, and (*d*) to 'make any amendment or any consequential or incidental order that may be just or proper.' The question is whether the order of the Appellate Court in this case is 'consequential,' as it is not suggested that it is 'incidental,' a term which seems to exclude any final order. It has been held by the High Court of Allahabad that it is not consequential [see *Balli Pande* v. *Chittan* (1)] and, by this Court, in the recently reported case, *Kari Singh* v. *Tufani Dhanuk* (2), that it is. The difference of opinion depends largely on first impression, as the only authority referred to in either Court is a passage in Sir Henry Prinsep's edition of the Criminal Procedure Code in a note to section 250, at page 250 of the 13th Ed., which seems to us, as we gather that it did to Stanley C. J., to be carefully framed so as to raise the question, but not to express any opinion as to its proper answer. Under these circumstances and looking at sections 250 and 423 only, we agree rather with the Allahabad decision than with that of this Court. Primarily we should suppose a *consequential* order to be an order that is the necessary consequence of the Court's decision, as an order that an appellant whose conviction is set aside should be discharged from his bail bond, or that any part of a fine imposed on him should be repaid ; and we incline to suppose that an order which depends on the consideration of a question that has not been previously considered is not within the terms of

(1) (1906) I. L. R. 28 All. 625. (2) (1909) 14 C. W. N. 212.

section 423. We are the more inclined to take this view on consideration of section 106 (*3*), which is referred to by the Judges in this Court in the case above cited as an example of the policy of the present Code of enlarging the powers of the Appellate Court. That enactment expressly enables the Appellate Court to bind a person down under section 106. This seems to show that an order to this effect is not a *consequential* order under section 423 ; and a power to bind down seems to be very much on the same footing as a power to avoid compensation to an accused person.

" It has been argued before us that if the Appellate Court has power to award compensation under section 250, the person against whom such order is made loses some of the safeguards provided by that section. In the first place, it is said that the provisions of section 250 (*1*) (*a*) would not apply to the Appellate Court, so that that Court could not be obliged to record or consider objections which the complainant might have been in a position to argue against the making of the order. In the second place, if payment of compensation is directed by a second or third class Magistrate, the complainant cannot, if he cares to appeal, be made to pay compensation unless there are two decisions against him ; whereas, if compensation is directed in the first instance by an Appellate Court, there is only one. Neither of these arguments seems to us to carry any weight. On the other hand, in the present case, it is no doubt inconvenient to borrow a phrase from Stanley C. J., that, where one tribunal has found a charge to be proved beyond all responsible doubt, another should find it to be not only false, but frivolous and vexatious.

" We regard the matter, however, as one of the first impressions, subject to the views expressed in the two decisions we have mentioned, and the indication given in section 106 (*3*) of the meaning to be attached to the word 'consequential' in section 423.

" We, therefore, refer the above-mentioned question to a Full Bench of this Court. If the answer is 'Yes' the Rule in this case will be discharged. If it is 'No', the Rule will be made absolute, the order set aside and any money paid under the order and in the hands of Lower Court must be refunded."

Babu Karunamoy Bose, for the petitioner. The question is whether section 423 covers section 250. The order with which the Appellate Court is directly concerned is the guilt or otherwise of the accused. In this case there was really a fresh judicial proceeding in the appellate stage. In the absence of clause (*3*) in section 106, section 423 (*d*) would not suffice to confer

1911

MEHI SINGH v. MANGAL KHANDU.

such wide powers to the Appellate Court. Even in section 106, whatever the Appellate Court may do, it cannot but be on facts that must be before it. There can be nothing in the nature of a fresh investigation into new matters. Any order under section 106 must be therefore *in consequence* of the conviction. But in this case the Appellate Court did proceed on matters not before it.

When the Original Court and the Appellate Court are of different opinion as regards an alleged offence, the complainant should not be called on to pay compensation in such cases.

On the question as to what is "incidental" order, I submit that the function of the Appellate Court is limited to consider what has been done by the lower Court. Taking then the instance of section 522, we find only "Court." Court may mean *appellate* or *original* Court. In section 250, the word used is "Magistrate." In section 544 also the word "Court" only is used. Here is a case of "consequential" order. Section 562 is another instance where "Court" only is used. Section 423 is an elaborate section and gives various powers in detail.

Kari Singh v. *Tufani Dhanuk* (1) is against me. All the previous rulings are in my favour. The difficulty has arisen since the introduction of clause (*d*) in section 423. The sole question is whether section 250 comes under that. The very fact of conviction gives rise to the conclusion that the complaint was not frivolous or vexatious. In such a case no fresh proceeding is necessary. It would be a *consequential* order.

The Appellate Court's power is to undo things done by the lower Court wrongly and not to start new proceedings there: see Judicature Act, 57 and 58

(1) (1909) 14 C. W. N. 212.

Vict., c. 16, s. 2., cl. (*2*), and Blake-Odger's Common Law.

Clause (*d*) of section 423 was enacted to fit in with section 106, clause (*3*), and that 106 (*3*) may not be inconsistent with section 423 (*d*).

[CHATTERJEE J. Was the procedure in section 250 followed in this case?]

No. The party was not called on to show cause.

Cur. adv. vult.

The judgment of the Court (JENKINS C.J., WOODROFFE, MOOKERJEE, CARNDUFF and D. CHATTERJEE, JJ.) was as follows:—

The question referred to the Full Bench is whether an Appellate Court can order compensation such as is contemplated by section 250 of the Code of Criminal Procedure, 1898.

Section 250, being confined by its terms to the Courts of Magistrates trying cases in the first instance, does not confer the requisite power. But it is suggested that clause (*d*) of section 423 (*1*) does.

Section 423 (*1*), which defines the powers of an Appellate Court in disposing of an appeal, begins by setting forth those powers in precise terms, and concludes with clause (*d*), which enables it to "make any consequential or incidental order that may be just or proper."

Now, in a Criminal Court, this phrase cannot be construed so liberally as to embrace any and every ancillary order which is capable of being described as "consequential or incidental." Otherwise an Appellate Court, affirming, for instance, a conviction of kidnapping a woman, might add, and enforce, a direction that the offender should pay her, by way of maintenance, a monthly allowance. This can hardly be.

1911

MEHI SINGH v. MANGAL KHANDU.

It would seem, therefore, that "consequential or incidental" orders within the purview of the provision, must fall under one or other of two heads.

First, there are orders which follow as a matter of course, being the necessary complements to the main order passed without which the latter would be incomplete or ineffective. Such are directions as to the refund of fines realised from acquitted appellants, or, on the reversal of acquittals, as to the restoration of compensation paid under section 250; and for these no separate authority is needed.

Secondly, there are orders which, though ancillary in character, require more than the support of a Criminal Court's inherent jurisdiction, and could not be passed without express authority.

An order mulcting a complainant to compensate an accused for having been frivolously or vexatiously charged seems to fall under the second head. It does not necessarily follow or arise out of an order of discharge or acquittal, and it is not, *per se*, an order "consequential or incidental" thereto. For the issue primarily before the Court is whether the accused has been proved to be guilty or not, and the question whether the complaint against him was merely frivolous or vexatious is another matter importing fresh considerations. The making of an award for compensation would, consequently, seem to need express authority, and an order therefor is not "consequential or incidental" to an order of discharge or acquittal, unless the discharging or acquitting Court has, *aliunde*, power to make it. In an original Court it is, by virtue of section 250, "consequential or incidential" to an order of discharge or acquittal made there; but it is not *quoad* a like order passed on appeal.

If this be so, then the clause can be relied upon only if it be sufficient to extend to an Appellate Court,

to be exercised by it, *mutatis mutandis*, the special power given to an original Magisterial Court alone by section 250. But it falls short of this, and, so far as appears, it never occurred to the learned Judges who decided *Harichand* v. *Fakir Sadrudin* (1) that it could be appealed to in this connection. It does not, like section 2 of the Supreme Court of Judicature (Jurisdiction) Act, 1894 (57 and 58 Vict., clause 16), or o. XLI, r. 33, of the Code of Civil Procedure, 1908, invest an Appellate Court with authority "to make any order which ought to have been given or made" by the Court below; nor does it, like section 107 of the latter, confer upon Appellate Courts "the same powers" as Courts of original jurisdiction. It does not amplify the powers of Appellate Courts: but what it does is to modify the exhaustive character which, without it, section 423 (*1*) would apparently have, and so to prevent any conflict between its special provisions and the general provisions of, *e.g.*, section 517 or section 522.

And, as the exercise of the power in question by an Appellate Court would involve such an extreme measure of contempt for the judgment of the inferior Court concerned, that it could but seldom be used with propriety, it can readily be understood why the Legislature should not have thought it worthwhile if, indeed, it did not think it actually inexpedient, to extend it to such a Court.

For these reasons, the majority of the Full Bench are of opinion that the answer to the question referred should be in the negative.

(1) (1901) 3 Bom. L. R. 841.

S. M.

ORIGINAL CRIMINAL.

Before Mr. Justice Woodroffe, Mr. Justice Mookerjee and Mr. Justice Chitty.

1911

Aug. 21.

IN THE MATTER OF RUDOLF STALLMANN.*

Habeas Corpus—High Court, jurisdiction of—Extradition Proceedings, jurisdiction of High Court in—Code of Criminal Procedure (Act V of 1898), s. 491—Indian Extradition Act (XV of 1903), s. 3, sub-ss. (3), (4), (6), (7) and (8), and s. 4, sub-s. (1)—Evidence Act (I of 1872) if exhaustive—English Extradition Act (33 and 34 Vict., c. 52), part of the lex fori—Foreign Records, authentication and admissibility of—Copy of document proved in Foreign Court, if admissible—Deposition taken in absence of accused—Evidence of offence on which Magistrate may act—Arrest, irregularity of, if vitiates proceedings otherwise regular—Magistrate, who may be chosen by Government—Government of Bengal, if can issue order on requisition made to Government of India—if such order can be ratified by Government of India—Fresh proceedings, legality of, whilst previous ones pending—Magistrate, if can record evidence after sending report to Government—Refusal of reasonable opportunity to fugitive to produce evidence, whether affects jurisdiction of Magistrate.

It must be shown clearly that a supreme right such as that to *habeas corpus*, or to directions in the nature of that writ, has been expressly (if that be possible to the legislature) taken away. There is no such express provision in the Indian Extradition Act.

The English Extradition Act did not give the right to *habeas corpus*. It merely declared a right which existed independently of that statute. *In re Siletti* (1), and *Ex parte Besset* (2) followed.

When a person appears before the High Court and says that he is illegally detained, the High Court can enquire whether the warrant for his custody was validly issued in extradition proceedings.

If the provisions of the Legislature have not been carried out, the High Court can interfere, notwithstanding that the warrant has been given in extradition proceedings. *Rudolf Stallmann* v. *Emperor* (3) distinguished.

* Special Bench (Ordinary Original Criminal Jurisdiction).

(1) (1902) 87 L. T. 332, 334; 71 L. J., K. B. 935.

(2) (1884) 6 Q. B. 481.

(3) (1911) I. L. R. 38 Calc. 547.

Section 3, sub-section (*6*) of the Indian Extradition Act, 1903, is not a substitute for and does not interfere with proceedings taken under section 491 of the Code of Criminal Procedure, 1908, the provisions of which are as much binding as those of the Extradition Act.

The Indian Evidence Act (I of 1872) does not contain the whole law of evidence governing this country. Under section 2, which saves certain rules of evidence, the English Extradition Act, which is applicable to this country, is part of the *lex fori*.

Records, therefore, of the Berlin Court, which are authenticated in the manner prescribed by sections 14 and 15 of the English Extradition Act, can be properly admitted in evidence.

A *copy* of a document (*Bill*), the *original* of which was proved in the German Court, is admissible as part of the records of the German Court.

There may however be cases in which the production of the original document may be necessary for the enquiry in this country.

If there is evidence before the Magistrate, the fugitive criminal cannot ask the Court to determine whether a *prima facie* case has been properly found on such evidence. *In re Siletti* (1) followed.

The High Court will not sit in appeal to review and weigh the evidence. It is sufficient that there should be some evidence of the offence upon which the Magistrate may reasonably act.

Any irregularity in the original arrest of the accused is immaterial, provided that the subsequent proceedings have been right. *R.* v. *Weil* (2), followed.

The substantial question is not how the accused is brought into Court, but whether the Court which enquired into his case had jurisdiction to do so.

The Government of India may issue its order to *any* Magistrate, and such Magistrate may issue a warrant, provided he is one who has jurisdiction to enquire into the crime of the nature of that for which extradition is sought. Therefore, an enquiry into the case of a fugitive criminal under arrest in Calcutta can be made by the Magistrate of Alipore, if duly authorised.

An order issued under section 3, sub-section (*1*) of the Indian Extradition Act, 1903, by the Government of *Bengal* upon a requisition made to the Government of *India* is invalid, and cannot be "ratified" by a subsequent order of the Government of *India*. Where, however, the latter order directs the Magistrate in pursuance of the former order "and of the statutory provisions in that behalf to enquire into the said case," the Government gives valid effect to its intention, and the Magistrate has jurisdiction to enquire.

(1) (1902) 87 L. T. 332 ; 71 L. J. K. B. 935.

(2) (1882) 9 Q. B. D. 701 ; 15 Cox. C. C. 189.

1911

RUDOLF STALLMANN, *In re.*

Under section 528 of the Code of Criminal Procedure, 1898, the District Magistrate can transfer to his own file, from that of the Deputy Magistrate, an application by the fugitive criminal for return of his property.

The Magistrate making the enquiry under section 3 of the Indian Extradition Act, 1903, can initiate fresh proceedings notwithstanding proceedings taken under a previous order.

When the Magistrate sends up his report to the Government of India under section 3, sub-section (*b*) of the Indian Extradition Act, 1903, he becomes *functus officio*, and renders himself incapable, therefore, of recording evidence that may be subsequently produced.

The Legislature intended that the fugitive criminal should be given an opportunity of defence. If such opportunity is not given, it goes to the jurisdiction of the Magistrate. The enquiry, therefore, is not according to law, and the issue of the warrant is itself invalid.

If the Magistrate suspected that the accused had no evidence, it is open to him to question the accused. If the latter stood on his right not to answer, the Court might draw such inference as the refusal to reply and the circumstances of the case suggested.

Per MOOKERJEE J. The burden lies very heavily upon those who assert that a right of so much importance to the criminal as *habeas corpus*, given by the Common Law, has been taken away by implication.

Section 491 of the Code of Criminal Procedure, 1898, is applicable to cases under the Indian Extradition Act. *Rudolf Stallmann* v. *Emperor* (1) distinguished.

The jurisdiction of the High Court has not been taken away merely because the Government of India has already issued a warrant for surrender under section 3, sub-section (*8*) of the Indian Extradition Act, 1903.

Depositions which have not been taken in the presence of the accused may be admitted by the Magistrate. *In re Counhaye* (2).

Where there is no evidence before the Magistrate, the Court will interfere. *R.* v. *Maurer* (3), approved of.

The Court will not consider questions regarding evidence, unless the objection is such that if effect were given to it, there would be no evidence left upon which the order for extradition could be supported.

Under section 4, sub-section (*1*), the Magistrate may issue a warrant when the person to be arrested is within his jurisdiction. Section 4 merely provides a preliminary procedure. Under it an arrest may be effected before

(1) (1911) I. L. R. 38 Calc. 547. (2) (1873) L. R. 8 Q. B. 410.
(3) (1883) 10 Q. B. D. 513.

the receipt of the requisition mentioned in section 3, otherwise the criminal might escape. The two sections do not overlap.

Under section 3, sub-section (*1*) of the Indian Extradition Act, 1903, the only Government competent to issue the order for enquiry is the Government to whom the foreign state has made a requisition. This function must be performed strictly, and cannot be delegated.

Where the provisions of the statute have not been followed, the report of the Magistrate cannot afford a foundation for the order of the Government of India under section 3 of the Indian Extradition Act, 1903.

THE facts of the case as disclosed in the written statement submitted by Rudolf Stallmann to the Government of India were as follows:

Rudolf Stallmann, a German subject, was arrested on the 26th April 1911 on board the S.S. *Caspian* as she was coming up the river Hooghly on her way to the Port of Calcutta, under a warrant purported to have been issued by Mr. Sukumar Haldar, Deputy Magistrate, first class, in charge of the Sudder Subdivision of Alipore, on the written complaint of Superintendent Ellis of the Criminal Investigation Department, dated the 23rd April 1911 (on which date the S.S. *Caspian* was in the Bay of Bengal on her way to Calcutta), charging him with having obtained money by false pretences from one Von Dippe in Berlin in Germany. Upon landing in Calcutta on the 26th April 1911, he was taken to the Lall Bazar Police Station and detained there till he was produced on the 27th April 1911 before the Deputy Magistrate of Alipore who had issued the warrant under which he was arrested, and was by him admitted to bail in the sum of Rs. 2,000. On the 2nd May 1911, his counsel and vakil appeared before the said Deputy Magistrate, who directed them to appear before the District Magistrate at Alipore, who by an order dated the same day had withdrawn the case to his own file for disposal. He was released on the said bail, and while

1911

RUDOLF STALLMANN, *In re.*

residing at Spence's Hotel, Wellesley Place, in Calcutta, was re-arrested on the 8th May 1911 by the said Superintendent Ellis under a warrant bearing the same date issued by Mr. J. A. L. Swan, District Magistrate of the 24-Parganas, under section 3 (*2*) of the Indian Extradition Act, 1903, and was kept in custody at the Lall Bazar Police Station till about midday of the 9th May 1911, when he was produced before the said District Magistrate of Alipore, who ordered that he be released on his own bail of Rs. 2,000, together with two sureties of Rs. 5,000 each, and fixed the 20th May 1911 for the hearing of the case. Being unable to find the required sureties, he was taken into custody and kept as an under-trial prisoner in the Central Jail, Alipore. On the 12th May 1911, the High Court upon application ordered that he be released on his own bail of Rs. 2,000, together with two sureties of Rs. 1,500 each [see *Rudolf Stallmann v. Emperor* (1)]; and he provided the same and continued to live at Spence's Hotel. On the 20th May 1911, he appeared with his counsel before the District Magistrate of Alipore, who announced that he had made a preliminary order which he then read out, and handed a sheet of paper which purported to be a warrant issued upon an order of the Government of India to Superintendent Ellis who was present in Court requiring him to arrest Stallmann, and thereupon the Superintendent came up to where he was sitting beside his counsel and touched him signifying his arrest and handed back the warrant to the District Magistrate as having been duly executed. Stallmann's counsel objected to these fresh proceedings as illegal, improper, and without jurisdiction, and submitted a petition embodying these objections, and prayed for time to consider the matter and to move such authority

(1) (1911) 15 C. W. N. 736.

as he may be advised to do and to be allowed to remain on the same bail as before, but the District Magistrate refused his prayer for time and intimated that he would consider the question of bail later on. The case then proceeded, and the learned Advocate-General examined a witness to prove the correctness of the English translation of certain records alleged to be of a Berlin Court. His counsel objected to such evidence being given before the records had been proved, but the objection was overruled, and the learned Advocate-General after reading the translation of the Berlin records stated that that was the whole evidence in the case, with the exception of perhaps one or two formal witnesses from Simla, and the proceedings were adjourned till the 24th May 1911, he being allowed to remain on the same bail. It subsequently transpired that what purported to be an order of the Government of India, issued under section 3 (*1*) of the Indian Extradition Act, 1903, in pursuance of which the proceedings and re-arrest on the 20th May took place, was merely a letter from the Secretary to the Government of India in the Foreign Department, dated the 10th May 1911, and addressed to J. A. L. Swan, Esq., I.C.S., District Magistrate of Alipore, which purported only to "ratify and confirm" the order dated 8th May 1911 passed by the Government of Bengal under section 3 (*1*) of the Indian Extradition Act, 1903, and it was subsequently submitted that everything done under the colour of the proceedings of the 20th May was without jurisdiction and illegal.

On the 23rd May 1911, Stallmann moved the High Court in its Criminal Revisional Jurisdiction under both the Code of Criminal Procedure, 1898 (Act V of 1898), and the High Courts Charter Act, 1861 (24 and 25 Vict., C. 104), section 15, for a rule calling upon the District Magistrate to show cause why all the

1911

RUDOLF STALLMANN, *In re.*

proceedings beginning with the issue of the first warrant of the 24th April 1911 should not be quashed, but the High Court refused to grant the rule on the ground that it had no jurisdiction to revise the proceedings of a magistrate acting under sections 3 and 4 of the Indian Extradition Act, 1903: see *Rudolf Stallmann* v. *Emperor* (1).

On the 24th May 1911, the District Magistrate purported to continue the enquiry under section 3 (*3*) of the said Act, and after the examination of a formal witness the learned Advocate-General closed his case. Stallmann's counsel presented a petition praying for an adjournment for a fortnight in order to enable Stallmann to adduce evidence on his behalf, and stating that he had taken immediate and diligent steps for procuring certain material papers and documents from England as soon as he became acquainted with the nature of the charges he had to meet, but that it was not physically possible for any evidence to arrive before the date of his petition, but the District Magistrate passed an order, which is set out in the judgment of Woodroffe J., declining to grant any adjournment, and stating that if any evidence was forthcoming he could subsequently record it under section 212 of the Criminal Procedure Code. It was submitted that such refusal amounted in law and in fact to a denial of his right to produce evidence under section 3 (*3*) of the Indian Extradition Act, 1903, and section 208 of the Code of Criminal Procedure, 1898.

On the 26th May 1911, the District Magistrate passed orders concluding the enquiry and finding a *primâ facie* case against Stallmann. He then called upon Stallmann to submit any written statement which he might desire to forward for the consideration

(1) (1911) I. L. R. 38 Calc. 547.

of the Government of India under section 3 (*6*) of the Indian Extradition Act, 1903, and ordered him to file the same within a specified time. After this Stallmann was again arrested for the fourth time on the 20th June 1911 at Spence's Hotel, Calcutta, under a warrant issued by Mr. J. L. Swan, District Magistrate of Alipore, purporting to act under section 3 (*2*) of the Indian Extradition Act, 1903, on a fresh charge of having caused the loss of 22,000 marks to one Rudolf Kiepert in Germany. On the 28th June 1911, he appeared with his counsel before the said District Magistrate, and notwithstanding all the objections taken on his behalf and an application made for time to adduce evidence, the District Magistrate refused to grant time, and intimated that he was of opinion that a *primâ facie* case of cheating had been made out, and that he would make a report to that effect to the Government of India, and directed him to file his written statement by 2 P.M., on the 30th June 1911, which he did. The Government of India, acting upon the reports submitted by the District Magistrate of Alipore under section 3 (*6*) of the Indian Extradition Act, 1903, issued a warrant, dated the 1st August 1911, for the custody and removal of Stallmann under section 3 (*8*) of the said Act, and in execution thereof he was apprehended by and was in the custody of Superintendent Ellis at Spence's Hotel, and was to have been placed on board a steamer sailing from Calcutta the following morning, to be extradited to Germany, when he moved the High Court and obtained this Rule, the Court (Woodroffe J.) ordering Superintendent Ellis to produce the body of Rudolf Stallmann in Court at 11 A.M., next day.

The Rule came on for hearing on the 10th of August 1911, when Superintendent Ellis produced Rudolf Stallmann before the Court at 11 A.M.

1911

RUDOLF STALLMANN, *In re.*

The Advocate-General (*Mr. Kenrick, K.C.*) (with him *Mr. W. M. Cubitt*) instructed by *Mr. J. T. Hume*, *Public Prosecutor*, appeared to show cause.

Mr. Jackson (with him *Mr. St. John Stephen* and *Mr. K. N. Chaudhuri*) on behalf of Rudolf Stallmann. I see the learned Advocate-General standing up, but I apprehend I have to open my case and give your Lordships reasons in support of the Rule.

The Advocate-General. I am here under your Lordships' directions to produce the body of Rudolf Stallmann, and to show cause why he should be detained, and that he is in lawful custody. I produce the body, and I propose to show the nature of the custody, and that it is lawful.

Mr. Jackson. Then my learned friend can show cause, and I have the right of reply. This has been the practice ever since *Ameer Khan's Case* (1).

The Advocate-General. The order is to produce the body. What is your Lordships' ruling?

[WOODROFFE J. Our ruling is that we will hear Mr. Jackson.]

Mr. Jackson read the written statement of Stallmann which had been submitted to Government of India, and after dealing with the facts submitted that the warrant of arrest was absolutely invalid, that there was no jurisdiction to enquire into the matter, and that even if there had been, there was not sufficient evidence to constitute jurisdiction.

[WOODROFFE J. We will hear you first of all on the question of our right to interfere.]

Mr. Jackson. The power of the High Court to issue a writ of *habeas corpus* as it existed before has not been taken away by any enactment, except in cases coming within the provisions of the Regulations

(1) (1870) 6 B. L. R. 392.

specifically mentioned in sec. 491 of the Code of Criminal Procedure, 1898. This Court inherited those powers from the Supreme Court which had, by its Charter establishing it, the same powers as the Court of King's Bench in England: *Surendranath Banerjee* v. *Chief Justice of Bengal* (1). This writ of *habeas corpus* has been issued by this Court even outside the Ordinary Original limits of its jurisdiction: *In the matter of Ameer Khan* (2), and *In re Maharanee of Lahore* (3).

[WOODROFFE J. Was not the power of issuing the old writ of *habeas corpus* restricted by the Legislature under sec. 148 of Act X of 1875?]

Mr. Jackson. In that very section the use of the words "and neither the High Court nor any Judge thereof shall hereafter issue any writ of *habeas corpus* for any of the above purposes" showed that the old writ still existed for all purposes other than those enumerated in clauses (*a*) to (*g*) of sec. 148.

[WOODROFFE J. It is quite clear that Mr. Stallmann having been arrested by a warrant and being in custody within the limits of the Ordinary Original Jurisdiction of this Court, this Court has got power to issue a writ under sec. 491 of the Code of Criminal Procedure.]

Mr. Jackson. I wish to make my contention perfectly clear that such a valuable right as is conferred on the subject by this prerogative writ of *habeas corpus*, which was not conferred by the Extradition Act, but which existed wholly irrespective of it, and was part and parcel of the Common Law, cannot be taken away except by an express enactment of the Legislature: *Levinger* v. *The Queen* (4), and *Sprigg* v.

(1) (1883) I. L. R. 10 Calc. 109; L. R. 10 I. A. 171.
(2) (1870) 6 B. L. R. 392.
(3) (1848) Taylor 428.
(4) (1870) L. R. 3 P. C. 282, 289.

1911

RUDOLF STALLMANN, *In re.*

Sigeau(1). It cannot be taken away, or attempted to be taken away, by a mere side wind or by mere implication. As is explained in one of the above cases, once it is assumed that there is a right to a writ of *habeas corpus*, the onus lies heavily on the Crown to show that it has been taken away. Furthermore, it was by the Order in Council of the 7th March 1904 (*Gazette of India*, 14th May 1904, Part I, p. 463) declared under section 18 of the English Statute, that Chapter II of the Indian Act should take effect as if it were part of the English Statute.

[WOODROFFE J. We need not hear you any further on our powers to issue a writ under sec. 491 of the Code of Criminal Procedure, 1898, as unless what we hear from the other side proves otherwise, we are all agreed that this Court has the power under sec. 491 to interfere in a case of this sort.]

The Advocate-General. These proceedings are governed by the Statute 33 and 34 Vict., C. 52 (the English Extradition Act, 1870, and by Act XV of 1903, the Indian Extradition Act). In England there is no doubt under the English Act that the fugitive criminal can apply to the superior Courts for a writ of *habeas corpus*, but in India there is no such right, as sec. 3 of Act XV of 1903 has laid down quite a different procedure and substituted for the remedy of *habeas corpus* which exists in England a remedy by which the fugitive criminal has to submit his case for the consideration of the Government of India or the Local Government, as the case may be, for its final orders. The Legislature has specially differentiated between the position here and in England, and the provisions of the English Act relating to *habeas corpus* do not apply here,

(1) [1897] A. C. 238, 246.

and conflict with the provisions of the Indian Act. In India there is no Prerogative Writ of *habeas corpus* as it exists in England. There is, for instance, no Crown office here to seal and issue the writ as in England. There is only the special method of relief provided for in section 491 of the Criminal Procedure Code.

[CHITTY J. What was the remedy in this country before s. 491 of that code was enacted?]

Since its enactment there is no Prerogative Writ of *habeas corpus* as in England. There is only section 491 of the Criminal Procedure Code which provides for the High Court to give certain directions in the nature of a *habeas corpus*. The section only applies to infants. The English Extradition Act has provided a procedure for the carrying out of various international treaties (reads preamble), whereas in India the procedure in extradition proceedings is regulated by clause 2 of the Indian Extradition Act, 1903, which must necessarily exclude the operation of section 491 of the Criminal Procedure Code. The only remedy for the fugitive criminal in India is to approach the Government of India by means of his written statement. In England the Police Magistrate decides whether the fugitive offender shall be extradited. Here the Magistrate has no such power, and cannot even discharge him. He has to report the result of his enquiry to the Government of India or Local Government, as the case may be, for orders. Section 18 of the English Statute empowers the Legislature here to modify any of the provisions of the English Statute, and the latter will not apply if it is modified by the Indian Act. The Indian Act has, I submit, overruled certain portions of the English Statute. Besides the English Act, there is also the Treaty to be considered. I refer to section 11 of the Treaty. The Indian Act

1911

RUDOLF STALLMANN, *In re.*

does not give any right to apply to the Courts. Recourse to the Courts in India is provided for specially by section 3(7) of the Indian Act, and the discretionary power of granting or refusing extradition is not vested in the Courts here but in the Government. The warrant of the Government of India in this case precludes the Court from exercising its discretion in granting a writ of *habeas corpus*, and is a complete answer to this rule: *Rudolf Stallmann* v. *Emperor* (1), where it was held that the special provisions of clause 2 of the Indian Act excluded the jurisdiction of this Court under section 491 of the Criminal Procedure Code.

Mr. Jackson referred the Court again to the cases of *Levinger* v. *The Queen* (2), *Surendranath Banerjee* v. *Chief Justice of Bengal* (3), and *In re Maharanee of Lahore* (4), and cited 24 and 25 Vict., cl. 67, s. 22 and s. 6 of Act XV of 1903.

With regard to the question of the admissibility of the evidence, there is only one witness in the first case, namely, the prosecutor Von Dippe; the other witness being Manteuffel, a Police expert, whose evidence, I submit, is not admissible under our law: *Haranund Roy Chetlangia* v. *Ram Gopal Chetlangia* (5); *R.* v. *Weil* (6); Indian Evidence Act, sections 78 and 82; and Clarke upon Extradition, p. 172.

The Advocate-General. With regard to the arrest in the river Hooghly, under Government notifications all portions of the river Hooghly not included within the limits of the Port of Calcutta are included within the jurisdiction of the Court of the 24-Parganas. Moreover, whatever defects there may have been in

(1) (1911) I. L. R. 38 Calc. 547.
(2) (1848) Taylor 428, 433.
(3) (1883) I. L. R. 10 Calc. 109; L. R. 10 I. A. 171.
(4) (1870) L. R. 3 P. C. 282, 289.
(5) (1899) I L. R. 27 Calc. 639; L. R. 27 I. A. 1, 8.
(6) (1882) 9 Q. B. D. 701; 15 Cox. C. C. 189.

the original arrest, they were cured by the arrest in Court on the 20th May 1911: *R.* v. *Weil* (1). Under s. 54 of the Code of Criminal Procedure a Police officer would be justified in arresting Stallmann even without any warrant.

As regards the validity of the order to Mr. Swan to initiate these proceedings, there was the letter of the 8th May 1911 from Mr. Chapman, Judicial Secretary to the Government of Bengal, addressed to Mr. Swan. Mr. Chapman was the channel of communication between the Government of India and the Government of Bengal. His order was the order of the Government of India.

[MOOKERJEE J. Did the Government of India select the Magistrate Mr. Swan?]

No, but the Government of India is the Viceroy in Council, and it can depute the Local Government. The whole record was sent by the Government of India to the Government of Bengal for them to act. Even if the former had not specially authorised Mr. Swan to act under s. 3, yet there is no doubt that the order to him was an order by the Government of India.

With regard to the admissibility of the depositions, arts. 10 and 11 of the Treaty and secs. 14 and 15 of the English Extradition Act, which are applicable to this country, show that they are admissible.

[WOODROFFE J. Do you say that the English Extradition Act of 1870 is part of the *lex fori*?]

Yes, but of course the further evidence of witnesses would be governed by the Indian law. As regards the admissibility of hearsay evidence taken abroad, *see* Piggot on Extradition, p. 153, and sec. 82 of the Indian Evidence Act: see Woodroffe on the Evidence Act, 4th Ed., p. 430, Piggott on Extradition,

(1) (1882) 9 Q. B. D. 701; 15 Cox. C. C. 189.

1911

RUDOLF STALLMANN, *In re.*

pp. 96, 97 and 99; *R.* v. *Zossenheim* (1), *In re Counhaye* (2), and *In re Siletti* (3).

The Court is not sitting here on appeal, and will not review the decision of the Magistrate if there was any evidence at all. It is clear that Stallmann had traded under a false name, namely, that of Count Von Koenig, whereas his real name is Rudolf Stallmann and he is not a commercial clerk. Yet he gets introduced to Von Dippe under the false title of Baron Von Koenig and all through represented himself as such.

Mr. Jackson, in answer to the Court, said he was willing to put in an affidavit stating whether Stallmann had evidence in India or elsewhere now, and if so its nature, and what he sought to prove by it.

The Advocate-General. The enquiry before the Magistrate began on the 20th May 1911, and was adjourned till the 24th May, and was concluded when the accused applied for a postponement to produce his evidence. This application was rightly refused.

[WOODROFFE J. The Magistrate has given no reasons for his refusal.]

The Magistrate does not give his reasons for everything. The real test is to be found in the facts and averments set out in para. 30 of Stallmann's written statement which was forwarded to the Government of India.

[CHITTY J. Suppose Stallmann had a letter from Von Dippe stating he was not cheated, would you still say the Magistrate was right in not giving him time to produce such evidence?]

The Magistrate has to exercise his discretion, and in this case he has exercised it. In the first place, Stallmann is not being tried here; his trial is to take

(1) (1903) 20 T. L. R. 121.
(2) (1873) L. R. 8 Q. B. 410.
(3) (1902) 87 L. T. 332, 334; 71 L. J. K. B. 935.

place in Germany. His contention that the German Government was really wanting him for offences of a political character would not avail him: Piggott on Extradition, pp. 50 to 56, *In re Castioni* (1), which defines an offence of a political character. Refers to *In re Arton* (2), at pp. 109, 111, 113, and 115; and to *R.* v. *Meunier* (3).

There are a series of decisions of which *In re Siletti* (4) is one, which decided that the Court will not review the decision of a Magistrate if there is any evidence. The sufficiency of such evidence is a question for the Magistrate. In the cases cited the Judges in England have held that although they would not necessarily convict on the evidence before them, yet that evidence was sufficient to justify a Magistrate to commit. I offer no opposition to any affidavit that Mr. Jackson may file, but submit that as a matter of law he cannot be allowed to use any affidavit.

[WOODROFFE J. (addressing *Mr. Jackson*). We do not want any affidavit from you. We are all of opinion that no *primâ facie* case has been made out in Kiepert's case, but must tell you that we think that a *primâ facie* case has been made out in Von Dippe's case on the evidence as it stands.]

Mr. Jackson shortly dealt with the evidence in Von Dippe's case and said: I submit that for the reasons already set out fully in Stallmann's written statement to the Government of India no *primâ facie* case has been made out. However, that is a matter for your Lordships' consideration. On this point I would again refer to the observations of the Judge in *R.* v. *Weil* (5) and ask your Lordships

(1) [1891] 1 Q. B. 149.
(2) [1896] 1 Q. B. 509.
(3) [1894] 2 Q. B. 415.
(4) (1902) 87 L. T., 332; 71 L. J., K. B., 935.
(5) (1882) 9 Q. B. D., 701, 706; 15 Cox. C. C., 189.

1911

RUDOLF STALLMANN, *In re.*

to consider whether there is any evidence at all against my client if the evidence of the expert Manteuffel is utterly discarded and that of Von Dippe as to what actually took place on the occasion were to be considered by themselves. Refers to section 10 of 33 and 34 Vict., C. 52; section 3 of Act XV of 1903, and Piggot on Extradition, pages 83, 87, 90, 100, 103, 154 and 157. The Bill of Exchange, the subject-matter of this charge of cheating, was not rightly admitted in evidence, and I submit that even if sections 14 and 15 of the English Extradition Act, 1870, applied, that document could not be admitted under those sections. The law of evidence is contained in the Indian Evidence Act which includes all the laws of evidence in India: *Rani Lekrai Kuar* v. *Baboo Mahpal Singh* (1). The Bill of Exchange ought to have been duly authenticated and certified under sections 78 and 86 of the Indian Evidence Act of 1872, which it certainly was not, and if that Bill were not admitted in evidence, the case must necessarily fail. I submit in conclusion that Stallmann was not given any opportunity of adducing any evidence on his behalf before the Magistrate, and that the reasons given by him for refusing Stallmann's application for an adjournment to enable him to produce his evidence were perfectly worthless.

Cur. adv. vult.

WOODROFFE J. The petitioner, one Rudolf Stallmann *alias* Koenig, has been extradited to Germany on a single warrant dated 1st August in respect of two alleged offences of cheating or obtaining money by false pretences. In the first case he is said to have cheated one Von Dippe, and in the second one

(1) (1879) L. R. 7 I. A. 63, 70.

Rudolph Kiepert. At the conclusion of the extradition proceedings he submitted a written statement under section 3(*6*) of the Indian Extradition (Act XV of 1903). The Government however refused to refer the points of law raised by him to the High Court. Being in custody under the extradition warrant in Calcutta, he accordingly applied for an order in the nature of a writ of *habeas corpus* to test the legality of such custody and of the warrant which was said to justify it.

The Advocate-General has objected that we have no jurisdiction to interfere. Section 491 of the Criminal Procedure Code, however, enacts that the Presidency High Courts may, amongst other things, direct that a person illegally or improperly detained in public or private custody within the limits of their Ordinary Original Civil Jurisdiction be set at liberty. It is not necessary to consider the wider questions which have been raised as to whether the writ of *habeas corpus* has or has not been altogether abolished, and as to the remedy or remedies, if any, available to persons in custody outside such limits. In this case the petitioner is within the local limits, and the section applies, unless those who say it does not establish their allegation. The Advocate-General has contended that it does not, at any rate in the present case. I add this qualification as he did not make the point clear. At one stage of his argument he appeared to submit that the mere production of a paper purporting to be a warrant by the Government was sufficient, and that any enquiry into its validity was barred even though every step leading up to the warrant might be challenged as illegal and without jurisdiction. At another time he appeared to allow that there were cases where the the Code might apply. If this were so, the question

1911

RUDOLF STALLMANN, *In re.*

WOODROFFE J.

would be merely whether the present was such a case. I will, however, assume for the purpose of this judgment that the contention is that the Code is not applicable at all where the custody is sought to be justified by proceedings purporting to have been held under the Extradition Act. If the argument were sound, the result would be that an aggrieved party would be without remedy, except (as the Advocate-General suggests) by argument before the Magistrate whose jurisdiction, and the legality of whose proceedings he *(ex hypothesi)* impugns, or by an appeal to the Government whose warrant he, challenges. Under the Extradition Act, moreover the Government is not bound to refer the case to the High Court. And if it refuses, as here, the aggrieved party is (it is said) without remedy. It must, however, be shown clearly that a supreme right, such as that to *habeas corpus*, or to directions in the nature of that writ, has been expressly (if that be possible to the Legislature) taken away. There is no such express provision. On the contrary clause (*3*) of section 491, whether validly or invalidly, excepts certain regulations and Acts from the operation of the section. The Indian Extradition Act is not mentioned as being within the exception. It is not easy to think of a stronger circumstance against the contention of the Crown. We must assume that, if the Legislature had intended to withdraw the matter from our cognizance, it would have said so, but it has not. We are asked to infer that such was its intention, because, though in parts the procedure under the English and Indian Acts are the same, in others they differ; and because the Indian Act does not (as does the English Act) expressly refer to *habeas corpus*. But the English Act did not give the right to *habeas corpus*. It merely declared a right which

existed independently of the Statute: *In re Siletti* (1), *Ex parte Besset* (2), and indicated in section 11 (33 and 34 Vict., c. 52, 1870) the time when as a matter of procedure that right should be invoked. By the order in Council of the 7th March 1904 (*Gazette of India*, p. 463, 14th May 1904) it was under section 18 of the English Statute declared that Chapter II of the Indian Acts should take effect as if it were part of the English Statute. That order has not the effect of incorporating the procedure of section 11 of that Statute into this country which has a procedure of its own. The order may however be invoked to show so far as it goes that there was no intention to do away with the right to *habeas corpus* which was declared in a statute in respect of which the Indian Act was ordered to take effect as if it were part of it. It is true that the Indian Government is vested with powers relating to extradition, but the fallacy of the argument addressed to us consists in this, that it is assumed that because the Government has such powers in extradition proceedings, our own in a different jurisdiction are done away with. This Court, it is true, cannot do that which the Legislature, by the Extradition Act, has said shall be done by the executive. We cannot, except as allowed by the Act, interfere directly with the extradition proceedings themselves. It is however clearly erroneous to therefore assume that the Court cannot act in its own jurisdiction, because the subject in respect of which such jurisdiction is invoked happens to be connected with an extradition proceeding. The matter stands in this way. We are not here directly concerned with the extradition proceedings. A person however appears before us

(1) (1902) 87 L. T. 332, 334; 71 L. J. K. B. 935.

(2) (1844) 6 Q. B. 481.

1911

RUDOLF STALLMANN, *In re.*

WOODROFFE J.

who says that he is illegally detained. To that the Crown answer by production of the warrant for his custody. In order, however, to determine whether the custody under such warrant is legal, we must necessarily enquire into the question whether the warrant was itself validly issued. The Government can only isue a warrant by virtue of the provisions of the Legislature authorizing it. And if those provisions have not been carried out, the warrant and the custody thereunder may be found to be illegal. We can then interfere notwithstanding that the warrant has been given in extradition proceedings with which, except as otherwise expressly provided, we are not directly concerned. This decision is not at variance with that given in this matter: *Rudolf Stallmann* v. *Emperor* (1). It was there held, as above stated, that the proceedings under the Extradition Act are not subject to the superintendence of the Court. There was no question of *habeas corpus* before the Court then. The latter, however, incidentally observed that the special procedure under section 3 (*6*) of the Indian Extradition Act took the place of that indicated in section 491 of the Criminal Procedure Code. I should, however, prefer to say that the special procedure under section 3 (*6*) takes the place of that indicated in the English Act as the procedure to be followed in the extradition proceeding itself, and section 3 (*6*) is not a substitute for and does not interfere with proceedings such as these taken under a different jurisdiction to test a custody alleged to be illegal within the terms of section 491 of the Criminal Procedure Code. The provisions of section 491 of the Criminal Procedure Code are as much binding as those of the Extradition Act, and I hold that under the former we have

(1) (1911) I. L. R. 38 Calc. 547 ; 15 C. W. N. 737.

power to enquire into the validity of the warrant under which the petitioner is kept in custody.

For the petitioner it is objected that there is no evidence of the alleged offences because the Magistrate improperly admitted the records of the Berlin Court. It is argued that they were not duly authenticated and certified as required by sections 78 and 86 of the Indian Evidence Act. This contention fails, because the records have in fact been authenticated in the manner prescribed by sections 14 and 15 of the English Act which are applicable in this country. The Evidence Act does not contain the whole law of evidence governing this country. Section 2 of the Act saves rules of evidence contained in any Statute, Act, or Regulation in force in any part of British India.

The law of evidence is contained in the Evidence Act and in other Acts and Statutes which make specific provision on matters of evidence. One of such Statutes is the English Extradition Act which, as applicable to this country, is as much part of the *lex fori* as the Evidence Act itself. I hold that this objection fails.

Looking then at the depositions so admitted, it is contended that they do not disclose a *primâ facie* case in support of the requisition. On an application of this kind the applicant cannot say that there is evidence, but that this Court should determine whether the Magistrate has decided the question properly on such evidence: *in re Siletti* (1). This Court is not sitting in appeal to review and weigh the evidence. It is sufficient that there should be some evidence of the offence upon which the Magistrate may reasonably act. As regards Kiepert's case, however, I am of opinion that it cannot be said that

(1) (1902) 87 L. T. 332, 334 ; 71 L. J., K. B. 935.

1911

RUDOLF STALLMANN, *In re.*

WOODROFFE J.

there is any evidence of an offence. All that is shown is that a third party introduced the applicant to Kiepert—as Baron Von Koenig—and that the latter won of Kiepert in two games of cards a large sum. This is obviously insufficient. Even assuming to be correct the statement of Von Manteuffel, a German Police official, that the applicant is a well known card-sharper, there must be some evidence that he cheated at cards on the particular occasion alleged. I hold, therefore, that as regards Kiepert's case, there is no evidence of the offence charged, and that the warrant, so far as it is based on the proceedings taken as regards this charge, is invalid. It becomes unnecessary therefore to consider the other legal points raised in Kiepert's case.

I pass now to Von Dippe's case. I am quite unable to hold, as we have been invited to do, that a *primâ facie* case has not here been made out. On the contrary, I am clearly of opinion that a *primâ facie* case is shown on the evidence as it stands.

I have come to this conclusion independently of the evidence of the Police official, Von Manteuffel, though I must not be understood to hold that witness' evidence was, as has been contended, inadmissible. Where evidence is taken in this country, the evidence receivable must be governed by the rules of procedure here in force. It has, however, been argued that where evidence has been received from abroad, its admissibility depends on the law under which it has been taken, and that though the English cases do not deal specifically with hearsay evidence, yet the language of the judgments is sufficiently comprehensive to warrant the statement that evidence taken abroad, whatever be its nature, and however it may have been taken, must be admitted: and that such a rule is necessary to give effect to the Treaty obligations,

though the weight to be attached to the evidence is naturally a matter for the consideration of the investigating Court: see Piggott on Extradition, 153 154, 97, 98 and cases there cited. The matter is one which may on a future occasion require consideration, but though disposed to assent to the argument of the Advocate-General, I desire to reserve a final decision on the point, as such a decision is not necessary for this judgment,

It was also objected that the enquiry could not legally proceed in the absence of the original bill, which the applicant is alleged to have obtained by cheating, and that the copy filed was inadmissible in evidence. The original was shown to the witnesses, Von Dippe and Witkopf, at the enquiry in the German Court, where it now is. A copy has been sent out with the depositions. I have held that the records of the German Court are admissible. The copy of the bill is evidence as part of that record. At first sight this matter appears to be one which involves a decision on the point which I have just reserved. But a closer analysis reveals a difference between the two cases. In the case of hearsay the evidence as originally taken is opposed to English Law, whereas in the present matter the evidence was originally taken in conformity with English rules, the original having been produced when the witnesses spoke to it. Apart from any rule of evidence proper, there may be cases where the production of the original may be necessary for the purpose of the enquiry in this country, as when it is required in order tha witnesses called at the enquiry may speak to it. It is unnecessary to discuss this question as it does not arise before us.

I now pass to a consideration of the other points taken in Von Dippe's case necessitated by the last finding.

1911

RUDOLF STALLMANN, *In re.*

WOODROFFE J.

It is, *firstly*, said that the warrants of arrest of the 24th April 1911 and 8th May 1911 were bad. Apparently under section 4 (*1*) of the Indian Extradition Act, 1903, the fugitive must be within the local limits of the Magistrate's jurisdiction before he can issue his warrant. On the 24th April the petitioner appears to have been outside the jurisdiction, that is on the date of the issue of the warrant.

It has been contended that under section 54 (*7*) of the Criminal Procedure Code, a Police officer may arrest without warrant. But even assuming for the sake of argument that he could not, and that the warrant was not a good one, any irregularity in the original arrest is immaterial, provided that the subsequent proceedings have been right: *R.* v. *Weil* (1) where the fugitive was arrested without a warrant, and even without any requisition from the Foreign State.

The substantial question is not how the accused was brought before the Court, but whether the Court which enquired into his case had jurisdiction to do so. I hold that this objection fails.

Secondly, it is said that the warrant of arrest of the 8th May issued under section 3 of the Extradition Act was issued without jurisdiction. If it was, the same ruling applies. But the Magistrate had in fact jurisdiction for reasons which I will state in connection with the next objection.

Thirdly, it is argued that the Magistrate who made the enquiry and arrest under section 3 was without jurisdiction, as that section does not, it is contended, empower the Government to order a Magistrate to enquire and arrest where the fugitive is a person not within the local limits of his jurisdiction. In the

(1) (1882) 9 Q. B. D. 701 ; 15 Cox. C. C. 189.

present case the petitioner was at, and was arrested at, Calcutta by the Magistrate of Alipore who was ordered to make the enquiry. I think, however, that this is an erroneous reading of that section. The Government may issue its order to any Magistrate, provided that he is one who has jurisdiction to enquire into the crime of the nature of that for which extradition is sought. It is a provision in favour of the fugitive ensuring to him a right to such competency and efficiency in the Magistrate as a subject would have in the case of a crime committed in this country. If, therefore, by way of example, the offence for which extradition were sought was murder, any Magistrate in India could be ordered to enquire into the matter, who had jurisdiction to try such an offence if committed in this country. The words in section 3 (*1*) "if it had been an offence committed within the local limits of his jurisdiction," which have been relied on, are not in conflict with this conclusion. They are necessary, because no Magistrate is empowered to try offences committed in this country without reference to the locality where the offence was committed. This objection fails, though I desire to express the opinion that it would have been better if the Chief Presidency Magistrate had been directed to enquire. In that case there could have been no opportunity for the contention which has been raised before us that Alipore was selected as the venue to oust this Court's jurisdiction under section 491 of the code. It is also advisable that one particular Magistrate may, as in England, be directed to enquire into these matters, so that there may be an opportunity of gaining experience therein.

Fourthly, it is argued that the enquiry of the Magistrate under section 3 was without jurisdiction on the following grounds:—As the requisition was

1911

RUDOLF STALLMANN, *In re.*

WOODROFFE J.

made to the Government of India, it was necessary that the latter Government should issue the order under section 3. The order to enquire dated the 8th May 1911 was signed by Mr. Chapman, the Judicial Secretary to the Government of Bengal. A doubt having arisen as to whether this order of the 8th May was an order of the Government of India, a further order was issued on the 10th May by the Secretary to the Government of India. It is objected that the first order was bad, as it was given (as alleged) by the Government of Bengal, and that the second order was also bad, because it is not one under section 3 (*1*), but merely purports to ratify and confirm a previous invalid order, which cannot be done. The argument would have been avoided, if the Government of India had, as I think it should have done, issued its order direct in the first instance. As matters stand, we have to determine whether the first order was that of the Government of India or Bengal, and, secondly, if it was by the latter Government, whether the second order has a force independent of the ratification which it purports to effect. It is clear that if the first order was by the Government of Bengal, it was invalid and could not be ratified by the subsequent order. There is, however, evidence that Mr. Chapman in making the first order was acting under instructions from the Government of India, and the order of the 10th May states that fact. No doubt the order purports to ratify and confirm the earlier one, and it may be said that if the previous act was that of the Government of India, there was no need for ratification, whilst if it was by the Government of Bengal, it could not as an invalid order be ratified at all. It is, however, replied that these words are used in an evidentiary way only, and are only another form of stating that it was the Government of India which

had issued the previous order. Assuming that that was so, another objection arises. It is admitted that the Government of India did not appoint the Magistrate personally, but left it to the selection of the Government of Bengal which then acting for the Government of India appointed the Magistrate. It may be a question whether the Government can delegate its powers, and whether this did not amount to a delegation. But even assuming for argument, though not deciding in favour of the applicant, that the first order was a bad one on any or all of the grounds stated, and that it could not be confirmed, we find at the conclusion of the order of the 10th May the words "and direct you in pursuance thereof and of the statutory provisions in that behalf to enquire into the said case." The words "in pursuance thereof" which refer to the previous order do not here assist. But if, as is contended for the Crown, the subsequent words imply a present order to enquire independent of what had been previously done, then all the objections of the petitioner are met. It is quite clear that the Government on the 10th May intended to give the order, and I think the reasonable meaning of the document then given is "We gave you an order on the 8th through the Government of Bengal, but as a question has arisen as to the Government by which it was given, we state that it was given by ourselves, but, in any event and to cure all defects, we now direct you to proceed." I am of opinion, therefore, that the Government did give valid effect to its intention, and that the Magistrate had jurisdiction to enquire.

Fifthly, it is contended that the District Magistrate could not transfer the proceedings before Mr. Haldar to his own file. The "case" which was then transferred was not the matter which was later the subject of enquiry under section 3, but the

1911

RUDOLF STALLMANN, *In re.*

WOODROFFE J.

application of Stallman for the return of his property. Such a transfer was permissible under section 528 of the Criminal Procedure Code.

Sixthly, it is argued that the Magistrate could not initiate fresh proceedings on the 20th May whilst proceedings under the order of the 8th May were pending. Assuming for the sake of argument that the order of the 8th May was not a good order, then it is obvious that there were no proceedings validly pending. But if there were, there appears to be no substance in the objection. There is no reason shown why fresh proceedings could not be taken, nor why if one proceeding is abandoned another should not be started.

I now come to the matters in respect of which the petitioner alleges that he has been prejudiced. He firstly complains of the vagueness of the charges made against him, which did not (he says) furnish particulars reasonably sufficient to give him notice of the offence with which he was charged, and their alteration from time to time; and, nextly, he complains that he has been prejudiced by the action of the District Magistrate in hurrying through his enquiry and refusing to grant him any time for the production of evidence in defence.

I will deal with the second of these matters first, as a decision on this point renders unnecessary a decision of the first.

The facts are shortly these. On the 26th April the arrest was effected and on the 2nd May the extradition papers arrived. On the 20th May the enquiry was held and on the 24th it was concluded. On that day the applicant put in a petition asking for a fortnight's adjournment to consider his position, and stating that documents which he had sent for on the 27th April and which he might desire to put in evidence, had

not arrived. The Crown unfortunately, I think, objected to the adjournment. It, however, requested that the accused might be called on to state what the nature of his defence and evidence was, the contention being that the application was neither useful nor *bonâ fide*. The Advocate-General further contended that the allegation that extradition had been sought for the "political reasons" alleged by the applicant was, even if it was established, irrelevant and that this was a matter for the Magistrate to determine. The opposite party objected to the Advocate-General's suggestion and refused to make any statement. The Court did not on that enquire into or determine upon these matters, but passed an order in the following terms:—

> The Counsel for the accused applies for an adjournment on the ground that telegrams have been sent to England for certain evidence, and this evidence cannot be expected before the mail after next. This enquiry is being conducted as nearly as possible in the manner laid down in Chapter XVIII of the Criminal Procedure Code. Section 208, Criminal Procedure Code, requires me to take all the evidence that may be produced in support of the accused. But I am not bound to adjourn the hearing on the ground that evidence may be forthcoming on the next date fixed. If evidence is forthcoming, I can subsequently record it under section 212 of the Criminal Procedure Code. I therefore decline to adjourn the case."

As regards the last portion of the order, I may first observe that the Magistrate by sending up his report to Government on the 29th May became *functus officio* and rendered himself incapable of doing that which he said he would do if evidence were subsequently produced.

This order, it will be seen, does not proceed on the ground that the evidence sought was useless or that the application was made only with the object of delay. The ground upon which it proceeds, though not expressly stated, appears to be that urged before us on behalf of the Crown on this application. Here

1911

RUDOLF STALLMANN, *In re.*

WOODROFFE J.

it has been contended that the only obligation on a Magistrate under section 3 (*3*) of the Indian Extradition Act is to take such evidence as may be produced by the fugitive criminal, provided that such evidence is presently available and tendered at the close of the evidence given in support of the requisition. There is, it is said, no obligation to grant an adjournment under any circumstances whatever, the matter being merely one of grace. I cannot assent to this proposition. The Legislature intended that the fugitive criminal should be given an opportunity of defence. It cannot have been intended that he should be called upon to do that which might be physically impossible. In the present case, if the accused has a defence it could not reasonably be expected, under the circumstances of this case, that he should have produced it before the 24th May, three weeks only having elapsed from the date of the arrival of the extradition papers and the close of the enquiry in the case. In the other case the interval was still shorter, less than ten days having elapsed between the arrest and the conclusion of the enquiry, when on a petition for adjournment stating that the applicant wished to show that he had not cheated, the Magistrate without assigning any reason passed the order—"objection disallowed and time refused." Doubtless, as the Advocate-General has represented, expedition is desirable, but this must not be sought at the cost of depriving the accused of any opportunity to present his defence. It may be that, as the Advocate-General argues, he has none, and that the applications were made for the purpose of delay. If the Magistrate had reason to suspect this, it was open to him to question the applicant. The latter might have, if he liked, stood on his right not to answer. But if he did so, the Court might have drawn such inferences as the refusal to reply and the

circumstances of the case suggested. It did not do so, and we cannot speculate as to the existence of reasons for the Magistrate's order beyond those which appear on the order sheet; nor are we ourselves in a position to say on the materials before us that the application for adjournment was in fact for purposes of delay, when no steps were taken to enquire into the point; nor are we called upon in the absence of materials to speculate as to whether there is or can be any defence. I must hold that the applicant was not given an opportunity of defence which the Act provides for him.

The next question is as to the effect of this. If the matter were one of irregularity only, probably it would not be a ground for interference. But in the circumstances of the present case it went I think to the jurisdiction of the Magistrate. The Government may issue a warrant upon receipt of the Magistrate's report and written statement, if any. That report can only be made after an enquiry held in conformity with the provisions of the Act. The Act requires that during such enquiry evidence which may be produced on behalf of the fugitive criminal shall be received. This, as I have held, involves that a reasonable opportunity should be given in the judicial discretion of the Magistrate. In the present case the Magistrate refused such an opportunity for reasons which I hold are untenable. The result, therefore, is that the enquiry was not according to law and the issue of the warrant upon such an enquiry was itself invalid. This conclusion is to be regretted, for, if instead of an undue haste, which defeats itself, an opportunity for defence had been given, that defence would either have been substantiated, or it would have failed, and in either case the waste of time involved in the proceedings would have been evaded. I must, therefore,

1911

RUDOLF STALLMANN, *In re.*

WOODROFFE J.

hold that the extradition warrant is invalid as regards Kiepert's case, because there is no evidence of an offence; and as regards Von Dippe's case, because, though there is evidence of an offence, the applicant was given no opportunity of defence. I hold that the applicant has been illegally detained thereunder and direct that he be set at liberty.

We have been asked to pass orders with respect to his property detained by Government, but this is not a matter with which we can deal in these proceedings which are solely concerned with the liberty of the person of the applicant.

MOOKERJEE J. The rule now under consideration has been granted upon the application of one Rudolf Stallmann against whom a warrant for surrender has been issued by the Government of India under sub-section 8 of section 3 of the Indian Extradition Act, 1903. His contention is that his detention is illegal, as the provisions of the Indian Extradition Act have not been strictly followed, and that he is consequently entitled to be set at liberty. In answer to the rule, it has been argued on behalf of the Crown that this Court has no jurisdiction to give any directions in the matter, and that the production of the warrant issued by the Government of India is conclusive proof that the petitioner is now in lawful custody. The question of jurisdiction thus raised is of fundamental importance and requires careful examination at the outset.

On behalf of the petitioner, it has been argued in the alternative, *first* that this Court is entitled to issue a writ of *habeas corpus* and to determine thereon the legality of the detention of the petitioner; and, *secondly*, that the Court is entitled, under clause (*b*) of sub-section (*1*) of section 491 of the Criminal Procedure Code, 1898, to give directions in the nature of *habeas corpus*, and

1911

RUDOLF STALLMANN, *In re.*

MOOKERJEE J.

for that purpose to determine whether the petitioner is now in legal custody. On behalf of the Crown, the learned Advocate-General has suggested that it is not competent to this Court to issue a writ of *habeas corpus*, and that the provisions of section 491 of the Criminal Procedure Code are so manifestly inconsistent with those of the Indian Extradition Act, that they can have no application when a warrant has been issued by the Government of India under section 3 (*8*) of the Indian Extradition Act. It is not necessary for our present purpose to consider whether a writ of *habeas corpus* can be issued by this Court, or whether the powers of the Court in this matter can be taken away by the Indian Legislature. If the question arose for consideration, we should have to examine the principles recognised in the cases of *In the matter of Ameer Khan* (1), *Queen* v. *Amir Khan* (2), *In re Maharanee of Lahore* (3), and *Surendranath Banerjee* v. *Chief Justice and Judges of the High Court of Bengal* (4). It is sufficient for our present purpose to hold that section 491 of the Criminal Procedure Code is applicable to this matter. It is not disputed that section 491, by the very generality of its language, is applicable to cases under the Indian Extradition Act. It entitles this Court, *whenever* it thinks fit, to direct that a preson illegally or improperly detained in public or private custody within the limits of its Ordinary Original Civil Jurisdiction be set at liberty. The only restriction imposed upon the exercise of this power is that embodied in sub-section (*3*), which lays down that nothing in the section applies to persons detained under the Bengal State Prisoners Regulation, 1818,

(1) (1870) 6 B. L. R. 392 ; 6 B. L. R. 459 (App.).
(2) (1871) 9 B. L. R. 36.
(3) (1848) Taylor 428.
(4) (1883) I. L. R. 10 Calc. 109; L. R. 10 I. A. 171.

1911

RUDOLF STALLMANN, *In re.*

MOOKERJEE J.

and four other Regulations and Acts relating to State prisoners. This materially strengthens the position that section 491 was not intended to be excluded in its application when a warrant has been issued under section 3(*8*) of the Indian Extradition Act. The burden, therefore, lies very heavily upon those who, in the words of Sir Joseph Napier in *Levinger* v. *Reg.* (1), assert that a right of so much importance to the criminal, given by the Common Law, has been taken away by implication, unless such implication is absolutely necessary for the interpretation of the Statute. The learned Advocate-General has undertaken to discharge that burden by an examination of the provisions of section 3 of the Indian Extradition Act, and a comparison thereof with the provisions of section 3 and section 11 of the English Extradition Act, 1870. In my opinion, the attempt has wholly failed. It has not been disputed that section 3 and section 11 of the English Statute recognise the right of a fugitive criminal to have a writ of *habeas corpus* issued to test the legality of his detention. It has not been disputed also that the right is not created by the Statute, but exists under the Common Law: *Crowley's Case* (2), *Ex parte Besset* (3), and *In re Siletti* (4). The learned Advocate-General, however, has contented that although the order in Council made on the 7th March, 1904, makes the second chapter of the Indian Extradition Act take effect as if it were part of the English Statute, and although section 6 of the Indian Extradition Act attributes special meanings to the expressions "Police Magistrate" and "Secretary of State" in section 3 of the English Extradition Act, yet the effect is not to make the writ

(1) (1870) L. R. 3 P. C. 282, 289.
(2) (1818) 2 Swans. 1, 48.
(3) (1844) 6 Q. B. 481.
(4) (1902) 87 L. T. 332, 334; 71 L. J. K. B. 935.

1911

RUDOLF STALLMANN, *In re.*

MOOKERJEE J.

of *habeas corpus* applicable to cases of proceedings under the Extradition Act in this country, because a special procedure is prescribed by the Indian Extradition Act, radically inconsistent with the issue of a writ of *habeas corpus* or of directions of the nature of a *habeas corpus* under section 491 of the Criminal Procedure Code. The Advocate-General has minutely examined and contrasted the procedure on a requisition of surrender under the Indian Act and the English Statute respectively, and he has drawn special attention to divergences upon two important points, namely, first, that whereas under the English Statute a fugitive criminal may be discharged by the Police Magistrate for want of evidence, under the Indian Act the matter rests exclusively with the Government, and, secondly, that whereas the English Statute expressly recognises the applicability of a writ of *habeas corpus* to proceedings for extradition, the Indian Act not only makes no mention of any similar provision but allows a reference to the High Court at the discretion of the Government where the written statement of the person sought to be extradited or the report of the Magistrate raises an important question of law. The Advocate-General has invited us to hold that the reference to the High Court was intended by the Legislature to take the place of an application for a writ of *habeas corpus* by the alleged fugitive criminal under the English law. I am unable, after anxious consideration of the matter, to accept the contention as well founded. In my opinion, the reference to the High Court can in no sense be treated as a substitute for the writ of *habeas corpus*. The aggrieved party can have recourse to the latter remedy at his choice, whereas the former is entirely at the discretion of the Government. The Advocate-General strenuously contended that the sole remedy of the alleged fugitive

1911

RUDOLF STALLMANN, *In re.*

MOOKERJEE J.

criminal is a representation of his case to the Magistrate whose jurisdiction, perhaps, he is driven to question, followed by a representation to the Government, the legality of whose proceedings he challenges. Sub-section (*7*) of section 3 of the Indian Extradition Act is, in my opinion, intended to serve an entirely different purpose; it enables the Government to secure the assistance of the High Court, should an important question of law arise upon the report of the Magistrate or the written statement of the fugitive criminal, but it does not take away from the criminal the benefit of the provisions of section 491 of the Criminal Procedure Code. I am not unmindful of the observations of this Court in *Rudolf Stallmann* v. *Emperor* (1), which may seem to mitigate against the view I take; the question which now arises, however, did not arise at that stage, and the view may well be maintained that although it is not open to this Court to interfere with the proceedings before the Magistrate during the pendency of the enquiry, occasion may arise for the exercise of our powers under section 491 of the Criminal Procedure Code, after the enquiry has closed. It has been argued, however, by the learned Advocate-General that as in the case before us a warrant has already been issued by the Government of India under sub-section (*8*) of section 3 of the Indian Extradition Act, the authority of this Court, assuming it to have existed at any stage, to issue a writ of *habeas corpus* or to give a direction of the nature of a *habeas corpus* has finally and completely terminated. The Advocate-General has contended in substance that as international extradition is the surrender by one nation to another, for trial or punishment, of a person accused or convicted of an offence within the jurisdiction of the latter, as soon

(1) (1911) I. L. R. 38 Calc. 547.

1911

RUDOLF STALLMANN. *In re.*

MOOKERJEE J.

as a warrant for surrender has been issued, it becomes an act of Government performed by the executive authority, the legality of which cannot be questioned in a Municipal Court. I am wholly unable to accept this position as well founded. The Government of India, when it issues a warrant for surrender under sub-section *(8)* of section 3 of the Indian Extradition Act, does so in exercise of a statutory authority. Such power can be exercised validly, only after strict compliance with the necessary preliminary provisions formulated by the Legislature in this very Act. Consequently, if the provisions of the Act have been contravened, the action of the Government may be successfully challenged, even though the warrant for surrender has been already issued. A similar question has been raised on more than one occasion in the Courts of the United States, and it has been uniformly ruled that the legality of the detention of a fugitive criminal may be examined on *habeas corpus* after the issue of a warrant for his surrender by the President as the head of the Executive: *Ex parte Kaine* (1), *In re Macdonnell* (2), *In re Sheazle* (3), *In re Herres* (4): see also the observations of Lord Watson in *Sprigg* v. *Sigeau* (5), which cannot be taken to have been affected by the decision of the Court of Appeal in *Rex* v. *Crewe (Earl)* (6). To put the matter briefly, although the surrender of the fugitive criminal is an executive function, the mere issue of the warrant of surrender does not deprive the Court of its jurisdiction to examine on *habeas corpus* the legality of the detention and to determine the propriety of the statutory acts upon the performance of which the validity of the warrant depends.

(1) (1853) 3 Blatchford 1 ; 14 Fed. Cas. 7597.
(2) (1873) 11 Blatchford 170; 16 Fed. Cas. 8772.
(3) (1845) 1 W. & M. 66 ; 21 Fed. Cas. 12734.
(4) (1887) 33 Fed. Rep. 165.
(5) [1897] A. C. 238.
(6) [1910] 2 K. B. 576.

1911

RUDOLF STALLMANN, *In re.*

MOOKERJEE J.

I am, therefore, of opinion that this Court has jurisdiction under section 491 of the Criminal Procedure Code to give a direction of the nature of *habeas corpus* and to examine whether the person detained in public custody under the Indian Extradition Act is legally detained; and I further hold that our jurisdiction in this matter has not been taken away, merely because the Government of India have already issued a warrant for surrender under sub-section *(8)* of section 3 of the Indian Extradition Act, 1903.

The next question, which calls for decision, relates to the manner and extent of the exercise of our jurisdiction. It is well settled in England that the Court hearing the application for a writ of *habeas corpus* is not a Court of appeal from the Magistrate on questions of fact; but has only to see that he had such evidence before him as gave him authority and jurisdiction to commit. The Court will not review the decision of the Magistrate, if there was any evidence before him to justify commitment; the sufficiency of such evidence is a question entirely for the Magistrate: *In re Arton* (1), *Ex parte Huguet* (2), *In re Counhaye* (3), *R.* v. *Maurer* (4), *In re Meunier* (5), *In re Siletti* (6); but when there was no evidence before the Magistrate, the Court will interfere: *R.* v. *Maurer* (4). The question has been much debated in the Courts of the United States, and although there are isolated decisions to the contrary (Moore on Extradition, Vol. I, sections 354-55), the rule is now firmly settled that a writ of *habeas corpus* cannot perform the office of a writ of error; if the committing Magistrate in extradition proceedings has jurisdiction of the

(1) [1896] 1 Q. B. 509.
(2) (1873) 29 L. T. 41.
(3) (1873) L. R., 8 Q. B. 410.
(4) (1883) 10 Q. B. D. 513.
(5) [1894] 2 Q. B. 415.
(6) (1902) 87 L. T. 332; 71 L. J. K. B. 935.

subject matter and of the accused, if the offence charged is within the terms of the Treaty, and if further the Magistrate has before him competent legal evidence on which to exercise his judgment, such decision cannot be reviewed on *habeas corpus*: *Terlinden* v. *Ames* (1), *Pettibone* v. *Nichols* (2), *Bryant* v. *United States* (3), *Ornelas* v. *Reyz* (4), *Oteiza* v. *Jacobus*(5), *Benson* v. *MacMahon* (6), Moore on International Law, Vol. IV, page 394, where it is pointed out that the view adopted by the Supreme Court of the United States accords with that adopted by the Judicial Committee in *United States of America* v. *Gaynor* (7). These principles must be borne in mind when we examine the grounds upon which the legality of the extradition proceedings is challenged on behalf of the petitioner.

The grounds which have been assigned by the learned counsel for the petitioner in support of his contention that the extradition proceedings were illegal and the warrant of surrender issued by the Government of India was invalidated, may be classified under three heads, namely, *first*, objections to the legality of the initial arrest of the petitioner and of the proceedings under section 4 of the Indian Extradition Act; *secondly*, objections to the institution of the proceedings under section 3; and, *thirdly*, objections to the mode of enquiry by the Magistrate under section 3. It will be convenient to consider the objections under the three heads just specified, though they were not placed before the Court in their logical or chronological sequence.

In so far as objections of the first class are concerned, two grounds have been pressed by the learned

(1) (1902) 184 U. S. 270.
(2) (1906) 203 U. S. 192.
(3) (1898) 167 U. S. 104.
(4) (1895) 161 U. S. 502.
(5) (1889) 136 U. S. 330.
(6) (1887) 127 U. S. 457.
(7) [1905] A. C. 128.

1911

RUDOLF STALLMANN, *In re.*

MOOKERJEE J.

counsel for the petitioners. It has been argued, in the first place, that the arrest of the petitioner on the 26th April 1911 while he was on the S.S. *Caspian* in the river Hooghly was illegal. It has been contended, in the second place, that the proceedings, which were instituted before Mr. Haldar, Deputy Magistrate at Alipore, were without jurisdiction, and the subsequent transfer thereof to the Court of the District Magistrate, Mr. Swan, on the 2nd May 1911, was equally without jurisdiction.

In so far as the first ground is concerned, I am inclined to accept the contention of the petitioner as well founded. Section 4, sub-section (*1*) of the Indian Extradition Act, provides that where it appears to any Magistrate of the first class or any Magistrate specially empowered by the Local Government in this behalf, that a person within the local limits of his jurisdiction is a fugitive criminal of a Foreign State, he may, if he thinks fit, issue a warrant for the arrest of such person. The plain meaning of the section is that the warrant may be issued when the person to be arrested is within the local limits of the jurisdiction of the Magistrate. It is not disputed that when Mr. Haldar issued the warrant on the 24th April 1911, the petitioner was not within the jurisdiction, and was, as a matter of fact, on board the ship in the Bay of Bengal. The issue of the warrant, therefore, was in its inception without jurisdiction. In this view, it becomes unnecessary to consider whether the part of the river Hooghly, where the petitioner was arrested on the 26th April, was within the jurisdiction of Mr. Haldar, Deputy Magistrate at Alipore, or of the Chief Presidency Magistrate at Calcutta.

There is no substance in the second objection that the transfer of the proceeding initiated in the Court of Mr. Haldar to the Court of Mr. Swan was without

legal authority. It is obvious that all that was pending before Mr. Haldar at the time was an application by the petitioner for return of the property which had been found on his person at the time of his arrest and had passed into the custody of the Police authorities. There can be no question, I think, that the proceeding before Mr. Haldar in this respect could be withdrawn by the District Magistrate under section 528 of the Criminal Procedure Code. In fact, section 4 of the Indian Extradition Act merely provides a preliminary procedure for the arrest of a fugitive criminal, and his release on bail or detention for not more than two months, pending the institution of proceedings under section 3, sub-section (*1*). When, therefore, an arrest has been effected under section 4, the purpose of that section has been practically served.

The substance of the objections of the petitioner under the first class consequently reduces to this, that his arrest was in its inception unlawful, and I shall assume that the arrest was unlawful notwithstanding the provisions of section 54, sub-section (*1*), clause (*7*) of the Criminal Procedure Code, read with section 23 of the Indian Extradition Act. The question arises, whether the illegality of the initial arrest vitiates the extradition proceedings. In my opinion, the question must be answered in the negative. It is sufficient to refer to the case of *R.* v. *Weil* (1), where it was ruled that irregularity in the original arrest is immaterial when the subsequent proceedings for extradition have been right. The essence of the matter is that what determines the validity of the warrant for surrender under section 3 (*8*) is not the legality of the initial arrest, but compliance with the procedure prescribed for the initiation and conduct of the enquiry under section 3. The jurisdiction of a competent Magistrate

(1) (1882) 9 Q. B. D. 701 ; 15 Cox. C. C. 189.

1911

RUDOLF STALLMANN, *In re.*

MOOKERJEE J.

to hold an enquiry under section 3, sub-section (*3*), is not affected by reason of the previous illegal arrest of the fugitive criminal. Section 3, sub-section (*3*), provides that when such criminal, that is, the fugitive criminal for whose surrender a requisition has been made by a Foreign State, appears or is brought before the Magistrate specially empowered by the Government to enquire into the crime, the Magistrate shall enquire into the case. The Magistrate can exercise his jurisdiction if the criminal appears or is brought before him; it is immaterial, for the validity of the enquiry, whether he appears voluntarily or has been previously arrested without authority. An analogy in support of this view is furnished by the elementary principle that a Court, having before it a person charged with a crime whom it is competent to try, is not deprived of jurisdiction by the fact that he has been forcibly and unlawfully brought from foreign jurisdiction. This principle was affirmed in the case of *Emperor* v. *Vinayak Savarkar* (1) and had been previously recognised in a variety of cases of the highest authority: *Reg* v. *Lopez* (2), *Ex parte Scott* (3), *Mahon* v. *Justice* (4), *Ker* v. *Illinois* (5) and *Reg.* v. *Walton* (6). I hold, therefore, that, even if it be assumed that the petitioner was illegally arrested, that circumstance did not invalidate the enquiry under section 3, sub-section (*3*) of the Indian Extradition Act; that he was in Court was sufficient to entitle the Magistrate to hold the enquiry, no matter how he had been brought before the Magistrate. The grounds included in the first class of objections, consequently, cannot be sustained.

(1) (1910) 13 Bom. L. R. 296.
(2) (1858) Dears. & B. 525, 538.
(3) (1829) 9 B. & C. 446.
(4) (1887) 127 U. S. 700.
(5) (1886) 119 U. S. 436.
(6) (1905) 10 Cana. Cr. Cas. 269.

The grounds comprised in the second class, that is, those that relate to the institution of proceedings under section 3, are four in number, namely, *first*, that proceedings under section 3 could not be instituted before the proceedings under section 4 had been terminated; *secondly*, that the District Magistrate could not be authorized to hold an enquiry under section 3, because the petitioner, at the time the authority was conferred upon him, lived beyond the limits of his territorial jurisdiction; *thirdly*, that the District Magistrate could not be authorized to conduct an enquiry under section 3, because the only Magistrate who could be authorized was the Magistrate who had taken action under section 4; and, *fourthly*, that the District Magistrate could be duly authorised only by the Government of India whereas he acted under the direction of the Local Government.

The first branch of this contention is obviously unsubstantial. Section 4, as I have already explained, does not contemplate any enquiry; it provides, if I may use the expression, for *ad interim* arrest of the alleged fugitive criminal so as to render effective the proceedings under section 3 when they are subsequently instituted. An arrest under section 4 may be effected before the receipt of the requisition from the Foreign Government mentioned in section 3; otherwise the criminal might escape if the receipt of the requisition in the usual diplomatic way had to be awaited in every case: cf. *Attorney-General* v. *Fedorenko* (1). The two sections do not overlap, and as soon as an arrest has been effected under section 4, and the question of bail or detention has been determined, its operation is, for all practical purposes, exhausted. There is no conceivable reason why

(1) (1911) 27 T. L. R. 541.

1911

RUDOLF STALLMANN, *in re.*

MOOKERJEE J.

thereafter a proceeding under section 3 should not be instituted.

In so far as the second branch of the contention is concerned, it has been argued that the District Magistrate could not be authorised to conduct an enquiry under section 3, because at the time such authority was conferred upon him, the petitioner lived in Calcutta beyond the limits of his territorial jurisdiction. This contention, in my opinion, cannot be supported. There is a clear difference in this respect between section 3 and section 4. The latter section authorises that Magistrate alone to issue a warrant for the arrest of the fugitive within whose jurisdiction he may be found. The former section, on the other hand, authorises the Government to issue an order for enquiry to any Magistrate who would have had jurisdiction to enquire into the crime if it had been an offence committed within the local limits of his jurisdiction. The plain meaning of the section is that the enquiry may be entrusted to any Magistrate subject to the qualification that he would have been competent to enquire into the crime if it had been an offence committed within the limits of his territorial jurisdiction. The essence of the matter, therefore, is that it is the nature of the crime which determines the status of the Magistrate to be selected; in other words the Legislature had in section 3 in view, not the place where the fugitive criminal might be found, but the nature of the crime he is alleged to have committed, and the experience and qualification of the Magistrate who is to hold an enquiry into the matter. From this point of view, the District Magistrate was not disqualified merely because the petitioner resided beyond the limits of his jurisdiction. It is not disputed that if the alleged offence had been committed within the local limits of the jurisdiction

of the District Magtstrate, he would have been competent to enquire into it; he was consequently qualified under sub-section (*1*) of section 3 to enquire into the case.

The third branch of the contention is, in my opinion, equally unsustainable. It is suggested that if sections 3 and 4 are read together, the inference follows that the only Magistrate who can be directed to enquire into the crime under section 3 (*1*) is the Magistrate who has previously issued a warrant for arrest under section 4 (*1*). There are two obvious answers to this argument, namely, first, that no such limitation, as is suggested, is justified by the language of section 3, sub-section (*1*), and, secondly, that action under section 4, sub-section (*1*), need not in every extradition case precede the institution of an enquiry under section 3.

The fourth branch of the contention raises the question, whether the District Magistrate was directed to enquire into the case by the Government of India or by the Local Government. It is beyond controversy that under section 3, sub-section (*1*), the only Government competent to issue the order for enquiry is the Government to whom the Foreign State has made a requisition for the surrender of the fugitive criminal. In this case, the requisition had been made to the Government of India, and that Government alone was competent to issue the order for enquiry to the Magistrate. This function must be performed strictly in accordance with the statute, and cannot be delegated. In the present case, I am of opinion that whatever might have been done by the Government at the initial stage, there was an order by the Government of India on the 10th May 1911, in conformity with section 3, sub-section (*1*). No doubt, the letter of that date is not very felicitously expressed, and it is

1911

RUDOLF STALLMANN, *In re.*

MOOKERJEE J.

open to the legitimate comment that it speaks of ratification of a previous order apparently issued by the Local Government. But as my learned brother Woodroffe has fully explained, the letter in substance confers an authority upon the District Magistrate to enquire into the matter under section 3, sub-section (*1*). In that view, I entirely agree. Consequently, the objections comprised in the second class and relating to the institution of the proceedings under section 3 must be overruled as untenable.

The grounds comprised in the third class, that is, those that relate to the enquiry under section 3, are three in number, namely, *first*, that the report of the Magistrate is based upon evidence not legally admissible; *secondly*, that, upon the evidence, no *primâ facie* case has been made out; and, *thirdly*, that even if it be assumed that the evidence established a *primâ facie* case, there has been no legal enquiry as contemplated by section 3, because the petitioner was not allowed any opportunity to adduce evidence and rebut the case sought to be made against him.

In so far as the first branch of these contentions is concerned, we must remember at the outset that the proceedings before the Magistrate cannot be questioned if there was some legal evidence on which he might properly conclude that the accused had committed an offence within the Treaty as charged: *Ornelas* v. *Reyz* (1). In other words, as has been sometimes said, on a writ of *habeas corpus*, the main questions to be decided are whether the Magistrate had jurisdiction and whether there was sufficient legal ground for commitment of the prisoner; and the Court will decline to consider questions touching the introduction of evidence and the sufficiency of the authentication of documentary proof, unless the

(1) (1895) 161 U. S. 502.

objection is such that, if effect was given to it, there would be no evidence left upon which the order for extradition could be supported: *Benson* v. *MacMahon* (1). To put the matter briefly, mere irregularities in the proceedings before the Magistrate, which are unimportant in regard to the sufficiency of the proceedings, are not reviewable on *habeas corpus*: *Stevens* v. *Fuller* (2). To the same effect is the decision in *Ex Van Inthoudt* (3), mentioned by Moore in his International Law, Vol. IV, page 396. In the case before us, we are obliged to examine the objections of the petitioner to the reception of evidence, because some of these objections, if allowed, would leave no *residuum* of evidence upon which the report of the Magistrate could be supported. The first reason assigned on behalf of the petitioner is that the foreign depositions and papers have not been properly authenticated in accordance with the provisions of section 82 of the Indian Evidence Act. This objection is based on the assumption that the matter is governed by the rules laid down in the Indian Evidence Act. In support of this view, reliance has been placed upon section 3, sub-section (*3*) of the Indian Extradition Act. I am unable to hold that this contention is well founded, because it is plain that the matter is governed by Article XI of the Extradition Treaty with Germany (14th May 1872), and section 15 of the English Extradition Act, 1870 (Order in Council, dated 10th August 1872). The provisions of the Indian Evidence Act, to which reference has been made, have no application, notwithstanding section 2 and section 5 and the observation of the Judicial Committee in *Rani Lekraj Kuar* v. *Mahpal Singh* (4): they merely show that the Indian Evidence Act has

(1) (1888) 127 U. S. 457. (3) Unreported.
(2) (1889) 136 U. S. 478. (4) (1879) I. L. R. 5 Calc. 744 ; L. R. 7 I. A. 63.

1911

RUDOLF STALLMANN, *In re.*

MOOKERJEE J.

repealed all rules of evidence not contained in any statute or regulation. Consequently the provisions of section 15 of the English Extradition Act, 1870, which are applicable to extradition proceedings in this country, notwithstanding section 18, govern the present matter, and it is not disputed that the depositions and papers forwarded by the German Government have been authenticated in accordance with section 15 of the English Extradition Act, 1870: see Piggott on Extradition, page 96, and *Queen* v. *Ganz* (1). The second ground assigned is that the original bill has not been forwarded, and that the copy attached to the record is not admissible. I am not prepared to accept this contention as substantial. The original of the bill was duly proved in the German Court, and it was made part of the deposition of the witness who proved it. Section 15 of the English Extradition Act, 1870, is, in my opinion, sufficiently comprehensive to render the copy of the bill admissible in evidence. But I do not wish it to be understood that the accused can in no case insist upon the production of the original; if the offence alleged is one for the investigation of which the original has to be examined, he may very well demand that the original should be produced so as to enable him to make a proper and adequate defence before the Magistrate. The case before us, however, is not of that description, and I cannot hold that there is any substance in the objection that the original bill has not been produced. The third ground assigned is that part of the evidence is hearsay, and is not admissible in this country. The question raised is of considerable nicety, and I reserve my opinion upon it, though I may add that, in view of Article XI of the Treaty with Germany, which provides that the authorities of the State

(1) (1882) 9 Q. B. D. 93.

applied to shall admit as entirely valid evidence the sworn depositions or statements of witnesses taken in the other State, it is by no means easy to support the objection of the petitioner. The question is lucidly discussed by Sir Francis Piggott in his Treatise on Extradition, page 153, where the learned author assigns weighty reasons in support of the view that the evidence taken abroad, whatever may be its nature and however it may have been taken, must be admitted; the Court in which extradition proceedings are instituted acts only as auxiliary to the Court in which the fugitive is ultimately to be tried after his surrender, and evidence which would be receivable there in proof of his guilt may be considered when the question of extradition is examined: Piggott, p. 100. The point, however, is immaterial for the purpose of the present case, because even if the hearsay portion of the evidence is excluded, there is sufficient *residuum* left upon which the Magistrate could base his report. The fourth ground, which has been somewhat faintly suggested, is that the evidence in the German Court was taken in the absence of the accused. The decision *In re Counhaye* (1) shows, however, that depositions which have not been taken in the presence of the accused may be admitted by the Magistrate. All the four grounds assigned in support of the contention that the report of the Magistrate is based upon evidence neither duly authenticated nor legally admissible entirely fail.

The second branch of the contention of the petitioner is that the evidence does not disclose a *primâ facie* case. I am not prepared to accept this contention so far as the case of Von Dippe is concerned, though it may be conceded that it is well founded in respect of the case of Kiepert. It is not necessary to

(1) (1873) L. R. 8 Q. B. 410.

1911

RUDOLF STALLMANN, *In re.*

MOOKERJEE J.

review the facts in detail; it is sufficient to state that the direct evidence, as also the surrounding circumstances shew that, so far as the former is concerned, a case has been made out. We must remember in this connection, as was observed in the case of *Sternaman* v. *Peck* (1), that where the committing Magistrate had before him evidence, even though it might be conflicting and far from convincing, of the commission of the offence by the person whose extradition was demanded, the Court would not on *habeas corpus* review his determination on the facts; if the Court would not interfere in such a case, it would clearly also not interfere where, as here, there was no conflict or doubt about the matter.

The third branch of the contention of the petitioner is that he had no opportunity afforded to him to adduce evidence in support of his defence. In my opinion, this contention is obviously well founded. Section 3, sub-section (*3*) of the Indian Extradition Act, makes it the duty of the Magistrate to take such evidence as may be produced in support of the requisition, and on behalf of the fugitive criminal. This involves by necessary implication the position that the Magistrate must afford reasonable opportunity to the person arrested to produce his evidence. The learned Advocate-General has contended that the Magistrate is bound to take such evidence as the arrested person may have ready in Court, that it is not the duty of the Magistrate to adjourn the hearing to enable him to produce his evidence, and that if the Magistrate adjourns the hearing, he does so only as a matter of grace. This contention is so manifestly unreasonable that I cannot but deem it lamentable that it should have been pressed on behalf of the Crown before the Magistrate, and should have found

(1) (1887) 80 Fed. Rep. 883.

1911

RUDOLF STALLMANN, *In re.*

MOOKERJEE J.

acceptance with that officer. In my opinion, a Magistrate who conducts an enquiry under section 3, sub-section (*3*) of the Indian Extradition Act, is bound to afford reasonable opportunity to the person arrested to produce his evidence, and if he declines to do so, he fails to conduct the enquiry in the mode prescribed by the Legislature. A Magistrate who calls upon the arrested person to do what in the nature of things is impossible, cannot, by any stretch of language, be deemed to comply even nominally with the requirements of the legislative provisions upon the subject. In the case before us, if we confine ourselves for the present to the enquiry on the requisition upon the basis of the complaint of Von Dippe, we find that it was not till the 20th May 1911 that the Magistrate issued a warrant for the arrest of the petitioner under lawful authority conferred by the Government of India. On the 24th May, the petitioner asked for time to enable him to produce evidence; the application was refused on the ground, substantially, that the Magistrate was under no obligation to grant an adjournment. The Advocate-General has asserted that as the petitioner had been first arrested on the 26th April, he had ample time to produce evidence, that his application for adjournment was made with a view to gain time, and that it is inconceivable that any evidence might be produced which would be of any assistance to the petitioner. I am unable to accept this argument as well founded. It is clear from the record that it was not till the 16th May 1911 that the petitioner was supplied with definite information as to the time and place of the offence alleged to have been committed by him. There is no foundation for the suggestion, therefore, that the petitioner had ample opportunity to produce evidence. But it is important

1911

RUDOLF STALLMANN, *In re.*

MOOKERJEE J.

to observe that the Magistrate did not refuse the application for adjournment, on the ground that it was not *bonâ fide*. The petitioner was not questioned on the subject, and no attempt was made to elicit information on the point, although the Advocate-General has stated that he suggested to the Magistrate that the petitioner should be called upon to indicate the evidence he desired to produce. It may well be that if upon an application for adjournment to produce evidence the petitioner refuses to indicate that there is any evidence that exists or is accessible, or is likely to be obtained, the enquiring Court may, in the light of surrounding circumstances, draw an inference against the *bonâ fides* of the application: *In re Farez* (1). Here, however, the question does not arise. The Magistrate did not investigate the question of *bonâ fides* of the application for adjournment, and, on the other hand, based his refusal on an erroneous view of his duty in this respect; this Court consequently cannot well be invited to assume that the application was not *bonâ fide*. I must, further, decline to accept the invitation of the Advocate-General to speculate whether any evidence could possibly be produced by the petitioner if his application had been granted. It is undeniable, in my opinion, that the course pursued by the Magistrate at the instance of the Crown made it impossible for the petitioner to give evidence in support of his defence. This observation applies with equal force to the case of Kiepert, to which, however, detailed reference is not necessary, because, as has already been held, no *primâ facie* case was there established; but it may be added that the arrest in that case was made on the 20th June, and, after the application for time had been refused, the proceeding before the Magistrate

(1) (1870) 7 Blatchford 345; 8 Fed. Cas. 4645.

1911

RUDOLF STALLMANN, *In re.*

MOOKERJEE J.

was concluded on the 28th June; obviously, there was not even a semblance of an opportunity afforded to the petitioner to give evidence in answer to the case sought to be made against him. Nor could evidence have been produced under section 212 of the Criminal Procedure Code, after the proceedings had terminated, because in each case, after the close of the enquiry, the Magistrate speedily submitted his report to the Government of India and became *functus officio* in the matter. I think it is indisputable that the petitioner has not been afforded any opportunity to produce evidence, and that this result has followed from the acceptance by the Magistrate of the view pressed by the Advocate-General that it was not his duty, under the Indian Extradition Act, to grant any adjournment at all to enable the petitioner to produce his evidence. Under these circumstances, the question arises, whether the detention of the petitioner can be deemed lawful, and whether it is competent to this Court to give directions in the nature of *habeas corpus* under section 491 of the Criminal Procedure Code. There can be no doubt that, where the provisions of the statute have not been followed, the report of the Magistrate cannot afford a foundation for the order of the Government of India under section 3 of the Indian Extradition Act. It may be conceded that, if this were merely a matter in the discretion of the Magistrate, the Court would not interfere on a writ of *habeas corpus*, but as was well stated in *In re Wadge* (1), the position is different if the decision of the Magistrate amounts to a clear denial of a legal right through a manifest abuse of discretion: *President of Brooklyn* v. *Patchen* (2), where Chancellor Walworth held that when the Court orders the trial to proceed on the erroneous assumption that it

(1) (1883) 15 Fed. Rep. 864. (2) (1831) 8 Wendell 47, 64.

1911

RUDOLF STALLMANN, *In re.*

MOOKERJEE J.

has no power to adjourn the trial, it is not merely an improper exercise of discretion, and the error may be corrected by a Superior Court. I do not wish it to be understood, however, that an arrested fugitive criminal is entitled, as a matter of right, to produce all evidence, that would in the ordinary course be produced at the regular trial in the foreign country after his extradition, although it cannot be disputed that he is entitled at the enquiry before the Magistrate to produce witnesses in his own defence to meet the *primâ facie* case sought to be made against him: *R.* v. *Zossenheim* (1). In the present case, the petitioner had no opportunity to produce any evidence at all, and no question therefore arises as to the extent to which he would be entitled to produce evidence. The reasonable view seems to be that it is the duty of the Magistrate to take such evidence as may be offered on the part of the accused, and to allow him reasonable time for that purpose, but he cannot claim an indefinite postponement of the proceedings for the purpose of obtaining testimony upon commission from foreign countries; in other words, a full and elaborate trial cannot be substituted for what is only intended to be a preliminary enquiry into the alleged crime: *In re Farez* (2), *In re Wadge* (3), and *In re MacDonell* (4). In my opinion, it is clear that in the present case the petitioner cannot be deemed to be legally detained, and it is incumbent upon us to exercise the jurisdiction vested in the Court under section 491 of the Criminal Procedure Code. I am not unmindful that extradition proceedings should not be conducted in a technical spirit with a view to prevent extradition: see *In re Herres* (5),

(1) (1903) 20 T. L. R. 121.
(2) (1870) 7 Blatchford 345; 8 Fed. Cas. 4645.
(3) (1883) 15 Fed. Rep. 864.
(4) (1873) 11 Blatchford 79; 16 Fed. Cas. 8771.
(5) (1887) 33 Fed. Rep. 165.

where it is said: "While the Court should review the proceedings to see that no extradition is consummated upon a mere pretext or to subvert private malice, yet if it appears that the crime has been committed, and probable that the accused has fled to this country for refuge, then a spirit of fairness, expecting that the foreign country will treat extradition proceedings from this country in the same spirit, requires that we act reasonably and justly, having reference more to the substance than to the form of the proceedings." In the case before us, we do not deal with the matter on grounds which may be deemed purely technical, but rather on a ground which goes to the root of the matter, namely, that an order has been made against the petitioner without any opportunity afforded to him to make out his defence. The result must be attributed mainly to the tenacity and success with which the advisers of the Crown insisted upon an expeditious termination of proceedings, which in their earlier stages at any rate might with advantage have been characterised by more faithful adherence to statutory provisions on the subject.

On these grounds, I agree with my learned brother Woodroffe that the petitioner must be set at liberty.

CHITTY J. For the reasons given by my learned colleagues, I concur in the order proposed.

Rule absolute.

C. E. B.

APPELLATE CIVIL.

Before Mr. Justice Caspersz and Mr. Justice Sharfuddin.

1911

Aug. 28.

MIDNAPORE ZEMINDARI COMPANY, LD.,

v.

NARESH NARAIN ROY.*

Mesne profits—Execution of decree—Immovable property, suit for—Purchaser pendente lite, whether legal representative of the original owner—Civil Procedure Code (Act V of 1908), OO. XX, r. 12(2); XXI, r. 102, and XXII, r. 10; and s. 2(11).

Proceedings for the assessment of mesne profits, after a decree had been obtained in a suit for recovery of possession of immovable property, are proceedings in continuation of the original suit.

A suit for recovery of possession of immovable property was brought against *A*. During the pendency of the suit, *B* and *C* purchased the property from *A*, but they did not apply to have their names added as defendants in the pending suit. The suit having been decreed, the decree-holder applied for execution of the decree against *A*, *B* and *C* and asked for possession of land and for the assessment of mesne profits. On an objection taken by *B* and *C* that they were not the legal representatives of *A* and that they could not be made liable in execution proceedings for the mesne profits decreed against *A*:

Held, that, although *B* and *C* were not the legal representatives of *A*, the execution proceedings being proceedings in continuation of the original suit, and they being purchasers *pendente lite*, they were liable for the mesne profits decreed against *A*.

APPEAL by the judgment-debtors, C. B. Gregson, and the Midnapore Zemindari Company, Ld.

In a suit brought against Messrs. Robert Watson & Co., Ld., for recovery of possession of immovable property, a final decree was passed by the High Court on the 13th December, 1906, awarding possession and

* Appeal from order, No. 474 of 1909, against the order of Srish Chandra Mukherjee, Subordinate Judge of Rajshahye, dated July 31, 1909.

mesne profits against the said Company. During the pendency of the suit, one Mr. C. B. Gregson and the Midnapore Zemindari Company, Ld., successively purchased the disputed property on the 29th of November, 1902, and on the 3rd of December, 1906. They did not apply to have their names added as defendants in the pending suit. On the 3rd of April, 1909, the decree-holder put in an application for execution of the decree in the Court of the Subordinate Judge of Rajshahye, against Messrs. Robert Watson & Co., Ld., Mr. C. B. Gregson, and the Midnapore Zemindari Company, Ld.; and they asked for possession of the decretal land and for assessment of mesne profits. Mr. C. B. Gregson and the Midnapore Zemindari Company, Ld. objected, *inter alia*, to the execution of the decree that they could not be made liable in execution proceedings for the mesne profits decreed against Messrs. Robert Watson & Co., Ld., and that they were not legal representatives of the said Company, and therefore the decree could not be executed against them.

The learned Subordinate Judge overruled the objections, and allowed the execution to proceed.

Against that order Mr. C. B. Gregson and the Midnapore Zemindari Company, Ld., preferred this appeal to the High Court.

Dr. Rash Behary Ghose (with him *Babu Jogesh Chandra Roy*), for the appellants. The appellants are not the legal representatives of Messrs. Robert Watson & Co., Ld. "Legal representative" has been defined in the Code of 1908 in section 2, cl. (11), and according to that definition the appellants could not be the legal representative of Messrs. Watson & Co., Ld. Order XXII, r. 10, does not apply to proceedings in execution of a decree; it has been so held under

1911

MIDNAPORE ZEMINDARI CO., LD., v. NARESH NARAIN ROY.

section 372 of the old Code of Civil Procedure, which is the same as Order XXII, r. 10 of the present Code: see *Goodall* v. *The Mussoorie Bank, Limited* (1). The appellants are not affected by the doctrine of *lis pendens*, so far as the liability to pay mesne profits are concerned. A decree cannot be executed against any person other than the judgment-debtor on the record, except when the judgment-debtor is dead it can be executed against the legal representatives. A limited company cannot be said to be dead; it may be dissolved: see *Dhuronidhur Sen* v. *The Agra Bank* (2). The appellants being in no sense the legal representatives of the judgment-debtor, the execution-creditor could not realise the money by levying execution against them.

Babu Dwarka Nath Chuckerbutty (with him *Babu Upendra Lal Roy* and *Babu Naresh Chandra Sen Gupta*), for the respondent. The appellants were brought on the record during the pendency of the suit: see Order XX, r. 12, of the Code of Civil Procedure. Proceedings in execution are proceedings in the suit: see *Puran Chand* v. *Roy Radha Kishen* (3). Articles 178 and 179 of Schedule II of the Limitation Act were held applicable to ascertainment of mesne profits. An auction-purchaser has been held to be a 'representative' of the judgment-debtor: see *Ishan Chunder Sirkar* v. *Beni Madhub Sirkar* (4). Question is whether Order XXII, r. 10, is applicable to execution proceedings. I submit, it is. Under Order XXII, r. 12, Rules 3, 4 and 8 do not apply to proceedings in execution of a decree. These are the only rules which have not been made applicable to execution proceedings. In the case of *Harish Chandra Tewary* v.

(1) (1887) I. L. R. 10 All. 97.
(2) (1879) I. L. R. 5 Calc. 86, 95.
(3) (1891) I. L. R. 19 Calc. 132.
(4) (1896) I. L. R. 24 Calc. 62.

Chandpore Company, Limited (1), it was argued that section 372 of the old Code did not apply to execution proceedings, and the learned Chief Justice was doubtful on the point. In this case a decree is yet to be made, and therefore it could not be said that the proceeding is in execution of a decree. In the case of *Bhugwan Das Khettry* v. *Nilkanta Ganguli* (2), substitution was made in a mortgage suit after a decree *nisi* was passed.

Dr. Ghose, in reply. The decree in this case was made long before the new Code was passed. It is not competent for the other side to contend that the proceeding is in execution of the decree. The terms of the decree are quite clear, which say that the mesne profits shall be ascertained in the execution proceedings. The effect of the present Code may be that the decree is not final till the mesne profits are ascertained; but the present case is governed by the old Code.

Cur. adv. vult.

CASPERSZ AND SHARFUDDIN JJ. This is an appeal, by the judgment-debtors, from an order of the Subordinate Judge of Rajshahye holding that they are bound, by the final decree of this Court, to pay mesne profits to the decree-holders for the respective periods during which they were, admittedly, in possession of the land in suit. That decree, dated the 13th December, 1906, awarded possession and mesne profits against Messrs. Robert Watson & Co., Ld. The litigation having commenced in the year 1899, the judgment-debtors, successively, purchased the property *pendente lite*, on the 29th November, 1902, and the 3rd December, 1906—though possession had been taken, in the latter case, on the 1st January, 1906. They did not apply to have their names added as

(1) (1903) I. L. R. 30 Calc. 961. (2) (1904) 9. C. W. N. 171.

1911

MIDNAPORE ZEMINDARI CO., LD., v. NARESH NARAIN ROY.

defendants in the pending suit. On the 3rd April, 1909, the decree-holders put in a petition for execution of their decree. They mentioned, in the ninth column of the application, the names of Messrs. Robert Watson & Co., Ld., Mr. C. B. Gregson, and the Midnapore Zemindari Company, Limited, and they asked for possession of the decretal land, and that mesne profits might be ascertained, against the judgment-debtors. The objection of Mr. C. B. Gregson and the Midnapore Zemindari Company was disallowed; hence this appeal. On behalf of the judgment-debtors it has been urged that they cannot be made liable in execution proceedings for the mesne profits decreed against Messrs. Robert Watson & Co.

Now, it admits of no doubt that possession of the land in suit can be given to the decree-holders against Mr. Gregson and the Midnapore Zemindari Company. They could not, being transferees *lite pendente*, resist execution of the decree so far as it relates to immovable property (Order XXI, rule 102 of the Code of Civil Procedure, 1908). The contentions of the learned vakil for the judgment-debtors are that they are not the legal representatives of Messrs. Robert Watson & Co.; that Order XXII, rule 10, does not apply to proceedings in execution of a decree; and that a money decree cannot be passed against persons who are not affected by the doctrine of *lis pendens*, so far as the liability to pay money in the shape of mesne profits is concerned, even if the suit be regarded as not having been terminated by the decree of this Court on the 13th December, 1906.

The transferees, Mr. Gregson and the Midnapore Zemindari Company, are certainly not the legal representatives of Messrs. Robert Watson & Co. within the definition in s. 2 (11) of the Code, but the case is not one under section 50, where action is taken on the

death of a judgment-debtor. It is a case of devolution of interest by sale during the pendency of the litigation. The questions then arise whether the suit continued after the 13th December, 1906; if not, whether Order XXII, rule 10 of the Code, applies to execution proceedings; and, if the suit did so continue, whether the claim for mesne profits can be separated from the claim for the land so as to defeat the operation of the rule of *lis pendens* which does not touch property which is not immovable.

In our opinion, the suit continued after the decree of this Court had been passed. Proceedings for the assessment of mesne profits are in continuation of the original suit. No *operative decree* can be passed until the mesne profits are ascertained on enquiries made in accordance with the directions given in the interlocutory decree. In support of this position, we may refer to the decision of their Lordships of the Privy Council in *Radha Prasad Singh* v. *Lal Sahab Rai* (1), which was followed in *Muhammad Umarjan Khan* v. *Zinat Begam* (2). The same view was adopted by a Full Bench of this Court in *Puran Chand* v. *Roy Radha Kish n* (3) where reference is made to the earlier cases. That being so, the suit is a single suit. Mesne profits are determined in the suit itself and not by way of execution for a fixed sum of money. In the present case, no decree for money is asked for, nor is any decree for money being executed. No authority has been cited to us for the view that a suit may continue for one purpose only after it has ended for another purpose. The case is stronger than that of *Puran Chand* (3), for there possession of land had been taken before mesne profits had been determined,

(1) (1890) I. L. R. 13 All. 53, 65; L. R. 17 I. A. 150.

(2) (1903) I. L. R. 25 All. 385.

(3) (1891) I. L. R. 19 Calc. 132, 136, 137.

1911

MIDNAPORE ZEMINDARI CO., LD., v. NARESH NARAIN ROY.

and, in such circumstances, it might have been contended that the final decree for mesne profits was a separate decree: see Order XX, rule 12 (2). The decree-holders here ask for possession of the land and for the assessment of mesne profits, simultaneously, with a view to a formal and final decree being prepared in respect of both the reliefs in one and the same suit: see *Gopal Chandra Chakravarti* v. *Preonath Dutt* (1). The question of *lis pendens* cannot arise independently for a part of the subject-matter of the litigation. The true test, as it seems to us, is whether Mr. Gregson and the Midnapore Zemindari Company were in wrongful possession of the land; if they were, and it is admitted that they were, they are liable to pay the profits they actually received, or might with ordinary diligence have received, therefrom.

The remaining contention, as to the scope of Order XXII, rule 10 of the Code, whether that rule applies to execution proceedings, need not be decided, because the present case is not one in execution of decree. In *Harish Chandra Tewary* v. *Chandpore Company, Limited* (2), doubt was expressed whether section 372 of the Code of 1882 applied to execution proceedings. The present Code (Order XXII, rule 12) seems to imply, by the principle of exclusion, that all the rules of that Order, except rules 3, 4, and 8, are applicable to proceedings in execution of a decree or order, and we are inclined to think that rule 10 is so made applicable.

The appeal is dismissed with costs.

S. C. G. *Appeal dismissed.*

(1) (1904) I. L. R. 32 Calc. 175. (2) (1903) I. L. R. 30 Calc. 961.

APPELLATE CIVIL.

Before Mr. Justice D. Chatterjee and Mr. Justice Teunon.

JATI KAR

v.

MUKUNDA DEB.*

1911

Aug. 14.

Usufructuary mortgage—Turn of worship in a temple—Transfer of Property Act (IV of 1882), s. 59—Mortgage-bond creating right to worship, whether requires attestation.

A turn of worship is not an interest in immovable property. Therefore an usufructuary mortgage-bond creating an interest in a turn of worship does not require attestation by witnesses under section 59 of the Transfer of Property Act.

Eshan Chunder Roy v. *Monmohini Dassi* (1), referred to.

SECOND APPEAL by the plaintiff, Jati Kar, *shebait* of Thakur Surja Narain Deb.

This appeal arose out of an action brought by the plaintiff for a declaration that he was entitled to perform the *sheba* of Thakur Surja Narain from the 13th to 20th of every month by virtue of an usufructuary mortgage-deed, executed by Radhamoni Bewa on behalf of her minor sons (defendants Nos. 3 and 4) on the 14th of July, 1879. The plaintiff alleged that on the strength of this usufructuary mortgage he performed the *sheba* of the idol for upwards of 25 years; and that the Raja of Puri (defendant No. 2) recognised this right of his in suit No. 248 of 1888 instituted against him by one Balkrishna; but, notwithstanding all this, defendant No. 1 was permitted

* Appeal from Appellate Decree, No. 1209 of 1909, against the decree of S. C. Ganguli, Subordinate Judge of Cuttack, dated Feb. 27, 1909, reversing the decree of Behary Lal Banerjee, Munsif of Puri, dated Jan. 28, 1908.

(1) (1878) I. L. R. 4 Calc. 683.

1911

JATI KAR v. MUKUNDA DEB.

by the manager to the Raja of Puri to perform the *sheba* of the idol during those very days; and therefore he brought the present suit.

Defendants Nos. 1 and 2 pleaded, *inter alia*, that the right was not transferable, that the plaintiff was not recognised as *shebait* in place of defendants Nos. 3 and 4, that the grand-father of defendants Nos. 3 and 4 was the original *shebak*, but he had in 1865 made a gift of this turn of worship in favour of the father of defendant No. 1, and that the plaintiff was performing the *sheba* as a paid servant only.

The Court of first instance decreed the plaintiff's suit. On appeal, the learned Subordinate Judge reversed the decision of the first Court, holding that regard being had to the provisions of section 59 of the Transfer of Property Act, and section 69 of the Evidence Act, the usufructuary mortgage-bond was not legally proved.

Against this decision the plaintiff appealed to the High Court.

Babu Lalit Mohan Mukherjee, for the appellant. A mortgage of a turn of worship does not require attestation or registration, as it is not an interest in immovable property. The mortgage-bond was sufficiently proved. The Transfer of Property Act of 1882 has no application to the present case, as the bond was executed in 1879: see Ghosh's Law of Mortgage, 2nd edition, page 198, and Regulations I of 1798 and XVII of 1806, which contain the old law on the subject of mortgage, and do not make any provision for attestation by witnesses. My client has adverse possession as against all persons except his mortgagors, defendants Nos. 3 and 4. I rely on the cases of *Jagannath Das* v. *Birbhadra Das* (1), and

(1) (1892) I. L. R. 19 Calc. 776.

Jagannath Prasad Gupta v. *Runjit Singh* (1). As to alienation to a *co-shebak*, it has been held to be legally void: see *Nirad Mohini Dassi* v. *Shibadas Pal Dewasin* (2), and *Baroda Charan Dutt* v. *Hemlata Dassi* (3).

Babu Jatindra Narain Chowdhury, for the respondent. The bond may not require attestation, but it must be proved. Plaintiff cannot succeed as the document has not been proved. Besides the Lower Appellate Court has not decided the question of possession in favour of the plaintiff. A *shebaitship* is not alienable.

Cur. adv. vult.

CHATTERJEE AND TEUNON JJ. The plaintiff brought this suit for the recovery of possession of a turn of worship in a certain temple for eight days in the month from the 13th to the 20th by virtue of a usufructuary mortgage from the mother and guardian of defendants Nos. 3 and 4, on the allegation that he had been dispossessed of the same by the manager of the defendant No. 2, the Raja of Puri, who is supporting the claim of defendant No. 1. The defendant No. 1 admits that the grand-father of defendants Nos. 3 and 4 was the original *sebak*, but says that he had in 1865 made a gift of this turn of worship in favour of his (defendant No. 1's) father, and that during his minority plaintiff had been employed as a *khatnihar*, or paid servant, on his behalf and used to pay him a certain amount of money every year

Defendants Nos. 3 and 4 did not contest the plaintiff's claim, but both defendants Nos. 1 and 2 did on various grounds. The Court of first instance decreed

(1) (1897) I L. R. 25 Calc. 354. (2) (1909) I. L. R. 36 Calc. 975.
(3) (1908) 13 C. W. N. 242.

1911

JATI KAR v. MUKUNDA DEB.

the suit for recovery of possession, but the learned Subordinate Judge has dismissed the same. It is contended in second appeal that the learned Subordinate Judge is wrong.

In the first place, the learned Subordinate Judge finds that the usufructuary mortgage-bond is not proved, because the evidence is not in conformity with the requirements of section 59 of the Transfer of Property Act and section 69 of the Evidence Act.

A turn of worship is not an interest in immovable property: see *Eshan Chunder Roy* v. *Monmohini Dasi* (1). Section 59 of the Transfer of Property Act, which is applicable to mortgages of immovable property only, has therefore no application. Then again the document in question was executed in 1879, three years before the Transfer of Property Act came into force, and under section 2, clause (*c*), the Act had no application. There is no other law which required that a document like the one in question should have been attested by witnesses.

Then the learned Subordinate Judge says: "No doubt the plaintiff was allowed to perform the *debsheba* from 13th to 20th of every month without a hitch, but that, in my opinion, does not create any right in plaintiff's favour, since the plaintiff has not been able to prove satisfactorily that he was doing the *sheba* from the 13th to 20th of every month as a *shebait*." We are unable to follow the reasoning of the learned Subordinate Judge. The plaintiff claims as the mortgagee of a *shebak* and not as a *shebak*; if he had possession as such mortgagee, that would be quite sufficient to make out a *primâ facie* title as such mortgagee. In the case of *Jagannath Das* v. *Birbhadra*

(1) (1878) I. L. R. 4 Calc. 683.

Das (1), it was held that the plaintiff who had acted as *shebait* for 10 years had acquired a complete title against the defendants who had not sued to oust him within six years under Article 120 of the second Schedule to the Limitation Act. Although the learned Subordinate Judge finds that he had no doubt the plaintiff had held possession for over 20 years, he distinguishes this case because the period was not 10 years.

Then the learned Subordinate Judge says: "It does not lie in the mouth of the defendant No. 2 to set up the right and possession of No. 1 defendant's father, Kangla, since the Raja's predecessor admitted plaintiff's possession by Exhibit 2;" and in the next sentence "Exhibit 2 does not show that plaintiff's possession or his over-right was ever admitted, since it distinctly mentioned that plaintiff was in possession on behalf of defendants Nos. 3 and 4." As the plaintiff claims as mortgagee only, the possession claimed by him in 1880 must have been as mortgagee only, and if that possession was recognised, that possession could not now be impeached by defendant No. 2 or his manager.

The plaintiff is himself one of the recognised *shebaks* on other days, and if in the case of such a *shebak*, on the acquisition of an additional turn of worship the ceremony of *shariti* be at all necessary, it is difficult to see how after undisputed possession for 20 years, and express recognition by or on behalf of defendant No. 2, the question can be raised in the present case. Then again, although the learned Subordinate Judge finds in the early part of his judgment that plaintiff was undoubtedly in possession of the *sheba* from the 13th to the 20th of every month, in a later part he says it was for the plaintiff to prove that

(1) (1892), I. L. R. 19 Calc. 776.

1911

JATI KAR v. MUKUNDA DEB.

the turn of worship of defendants Nos. 3 and 4 was from the 13th to the 20th, and in conclusion finds the second issue against the plaintiff.

The judgment of the learned Subordinate Judge is a curious combination of bad law and worse reasoning, and we have no hesitation in setting aside the same. As the judgment is full of contradictions, it is difficult to make out what has been found for, and what found against, the plaintiff. The case must, therefore, be remanded to the District Judge to try it himself. Costs to abide the result.

Appeal allowed; case remanded.

S. C. G.

PRIVY COUNCIL.

P.C.*
1911

June 19, 20; *Nov.* 9.

MIR SARWARJAN

v.

FAKHRUDDIN MAHOMED CHOWDHURI.

[ON APPEAL FROM THE HIGH COURT AT FORT WILLIAM IN BENGAL.]

Specific Performance—Right to minor of specific performance of contract entered into on his behalf by his guardian and manager of his estate—Contract for purchase of immovable property, and sale of it to minor—Power of guardian and manager—Want of mutuality.

In a suit for specific performance by a minor of an agreement for the purchase and sale to him of certain immovable property, entered into by the manager of the minor's estate and his guardian on his behalf :—

Held, by the Judicial Committee, that it was not within the competence, either of the manager of the minor's estate or of the guardian of the minor, to bind the minor or the minor's estate by a contract for the purchase of immovable property; that as the minor was not bound by the contract, there was no mutuality; and that consequently the minor could not obtain specific performance of the contract.

* *Present:* LORD MACNAGHTEN, LORD SHAW, LORD MERSEY and MR. AMEER ALI.

APPEAL from a judgment and decree (6th December, 1906) of the High Court at Calcutta, which affirmed the decree (23rd February, 1904) of the Subordinate Judge of Backerganj.

The first defendant was the appellant to His Majesty in Council.

The suit out of which this appeal arose was brought by the respondents (the first of whom was an infant suing by his next friend and duly appointed guardian) alleging that they were respectively the owners by right of inheritance of the property (immovable property) claimed in the plaint, and that a purchase thereof (at a Court-sale in execution of a decree) by the vendors of the first defendant was void: and the plaintiffs prayed for a declaration to that effect. They further alleged that previous to the auction sale the first defendant had agreed to sell them the property at the price which might be paid by him for it to the purchasers at the sale in execution; and they prayed in the alternative for a decree for specific performance of that agreement. As regards the prayer for a declaration that the sale in execution was void the suit was dismissed, but the Subordinate Judge made a decree for specific performance which was affirmed by the High Court (RAMPINI and WOODROFFE JJ.) after a reference of a question of law to a Full Bench of the Court.

The main question for determination in this appeal was whether a contract entered into on behalf of a minor by his manager or guardian, and found to be for his benefit, was enforceable in India by a decree for specific performance at the suit of the minor through his manager or guardian?

The facts of the case sufficiently appear in the reference to the Full Bench which will be found

1911

MIR SARWARJAN v. FAKHRUDDIN MAHOMED CHOWDHURI.

reported (together with the judgment of the High Court Bench on the return to it of the decision of the Full Bench) in I. L. R. 34 Calc. 163.

On this appeal,

De Gruyther, K.C., and *Kenworthy Brown*, for the appellant, contended that the agreement of 25th October, 1895, was not valid nor enforceable either on behalf of, or against, the minor, and that the Courts below had erred in granting a decree for specific performance. None of the authorities referred to by the High Court showed that the manager of the minor's estate had power, either as manager or guardian, to enter on his behalf into a personal covenant which would bind the minor. The minor, therefore, it was submitted, was not bound; and there being consequently no mutuality, the contract could not be enforced. The fact that it was for the benefit of the minor did not enable him to enforce it, as some of the cases in India appeared to have decided. Even if the agreement were valid, the rights of the respondents under it had, in the circumstances of the case, been subsequently waived and abandoned. There was besides no ratification of the agreement; a portion of a contract could not be ratified; it must be ratified, if at all, as a whole. Reference was made to Contract Act (IX of 1872), s. 199.

A. M. Dunne, for the respondents, contended that the appellant had in fact entered into the agreement with the manager and agent of the respondents, and the guardian of the minor; that the contract was for the benefit of the minor, and had been accepted and ratified by the respondents; and that it was consequently valid and binding, and was enforceable by a decree for specific performance. Reference was made

to *Mohori Bibee* v. *Dharmo Das Ghose* (1). Under the circumstances of the case and for the reasons given by the Divisional Bench of the High Court, the respondents were entitled to the equitable relief claimed.

De Gruyther, *K.C.*, in reply, referred to Fry on Specific Performance (5th Ed.), page 231.

The judgment of their Lordships was delivered by

Nov. 9.

LORD MACNAGHTEN. This is an appeal from a decree of the High Court at Calcutta affirming a decree of the Subordinate Judge of Backerganj.

All the questions raised in the litigation but one were disposed of before the appeal was taken to the High Court, and when the case was before a Division Bench of that Court, that question was made the subject of a reference to the Full Bench.

The reference was in the following terms: "Can specific performance of a contract validly entered into on behalf of a minor be enforced?"

The reference came before the Chief Justice and four other Judges of the High Court. They agreed in returning an answer which seems to be carefully guarded, and is perhaps rather enigmatical. The Chief Justice observed that the question submitted to the Court was "a wide and far-reaching question." His opinion was that they could only "answer the question by saying that if a contract is validly entered into on behalf of a minor, and there is mutuality in such contract, it might be specifically enforced." The other learned Judges concurred.

The case was then sent back to the Division Bench to be tried out on the merits. The decree under appeal to the High Court was a decree for the specific performance of an agreement for the purchase and

(1) (1903) I. L. R. 30 Calc. 539 ; L. R. 30 I. A. 114.

1911

MIR SARWARJAN v. FAKHRUDDIN MAHOMED CHOWDHURI.

sale of immovable estate. The agreement was expressed to be made between a Mr. Garth and the appellant Mir Sarwarjan. Mr. Garth was at the time manager of the estate of the respondent No. 1, who was then a minor.

After observing that they had already considered the evidence and had "come to the conclusions (i) that it was a contract validly entered into, and (ii) that there is mutuality with regard to it; for 'the agreement made by Mr. Garth with Mir Sarwarjan would seem to be as enforceable against the minor as it is against Mir Sarwarjan,'" the learned Judges of the Division Bench stated that they saw no reason to dissent from their views already expressed and recorded "(i) that the contract was validly entered into particularly when, as pointed out, it was for the benefit of the minor, and was accepted and ratified by him, and (ii) for the reason given 'there is no want of mutuality' in respect of this agreement."

The agreement in question was entered into by an agent of Mr. Garth, without any express authority from him, but there was some evidence that Mr. Garth adopted or assumed to adopt the agreement on behalf of the minor. At any rate it was assumed in both Courts and it was the opinion of the Subordinate Judge that the contract was not intended to bind the manager personally, and therefore it was assumed that it was intended to bind the minor or the minor's estate. It was also assumed that the purchase was an advantageous purchase for the minor. In this judgment and for the purpose of this judgment their Lordships accept all the foregoing assumptions.

The learned Judges of the Division Bench disposed of the question of mutuality at the first hearing in the following terms: "There is no want of mutuality in this case, for the agreement made by Mr. Garth

with Mir Sarwarjan would seem to be as enforceable against the minors as it is against Mir. Sarwarjan. The acts of a guardian in this country bind the minor. There is no difference between his position and powers and those of a manager." No other or further reason in regard to this point was given by the learned Judges when the case was referred back to them.

Without some authority their Lordships are unable to accept the view of the learned Judges of the Division Bench that there is no difference between the position and powers of a manager and those of a guardian. They are, however, of opinion that it is not within the competence of a manager of a minor's estate or within the competence of a guardian of a minor to bind the minor or the minor's estate by a contract for the purchase of immovable property, and they are further of opinion that as the minor in the present case was not bound by the contract, there was no mutuality, and that the minor who has now reached his majority cannot obtain specific performance of the contract.

Their Lordships, therefore, will humbly advise His Majesty that the appeal should be allowed, the order of the High Court discharged, and the suit dismished.

The respondent No. 1 must pay the costs of the appeal. Any costs paid under the order of the High Court must be repaid, but there will be no order as to costs in the Courts below.

Appeal allowed.

Solicitors for the appellant: *T. L. Wilson & Co.*

Solicitors for the respondents: *Morgan, Price & Co.*

J. V. W.

CRIMINAL REVISION.

Before Mr. Justice Stephen and Mr. Justice N. R. Chatterjea.

1911

Nov. 13

AMBAR ALI

v.

ANJAB ALI.*

Further Inquiry—Power to direct further inquiry against a person not named in the complaint nor before the Court—Notice, necessity of—Criminal Procedure Code (Act V of 1898), s. 437.

The Court has no jurisdiction to direct a further inquiry, under section 437 of the Criminal Procedure Code, in respect of a person who was not named in the complaint and against whom no other regular process has been issued.

An order under section 437 of the Code made without previous notice to the accused is bad in law.

Giridhari Marwari v. *Emperor* (1) followed.

ON the 5th January, 1911, one Anjab Ali, a tenant of the Kumar Gopika Estate, under the Court of Wards, lodged a complaint before the Sub-divisional Officer of Karimgunj against the petitioners 1 and 2 and several others, but not against the petitioner No. 3, who was never before the Court, for having cut and taken away some sun grass. The Sub-divisional Magistrate ordered a police enquiry, and the police sent in their report on the 22nd February. Subsequently the Extra Assistant Commissioner, after calling for and receiving a report from the manager of the Kumar Estate, ordered summonses, on the 20th March, against the petitioners 1 and 2 and the others named in the complaint, under sections 379 and 426 of the Penal Code.

* Criminal Revision, No. 1200 of 1911, against the order of G. Gordon, Additional District Magistrate of Sylhet, dated July 31, 1911.

(1) (1908) 12 C. W. N. 822.

The petitioners 1 and 2 only appeared, and the case came on for trial before Mr. Johnstone, who, after taking all the evidence for the prosecution and hearing arguments on both sides, discharged them, under section 253 of the Criminal Procedure Code, on the 13th May, and passed an order as follows :—"Recall processes against the remaining accused. Enter mistake of law."

The complainant, Anjab Ali, thereupon filed an application on the 20th July 1911, under section 437 of the Code, against the discharge of the first two petitioners, before the Additional District Magistrate, who, without previous notice to them, ordered a further inquiry into their case, and directed that the third petitioner, the master of the others, "be also made a co-accused." The petitioners then moved the High Court and obtained the present Rule.

Mr. S. P. Roy and *Babu Jadu Nath Kanjilal*, for the petitioners.

No one appeared for the opposite party.

STEPHEN AND N. R. CHATTERJEA JJ. In this case an order for further inquiry was made under section 437 of the Criminal Procedure Code. A Rule has been granted on two grounds: in the first place, that the further inquiry was ordered against the petitioner No. 3 when no complaint had been made against him. There were two persons accused and the petitioner No. 3 was their master. On the question of the further inquiry coming on, the Additional District Magistrate saw fit to order that the petitioner No. 3 should be joined with the others. This he had no authority to do without proper complaint or other regular process being issued in respect of the petitioner No. 3. He has made a mistake in joining the petitioner No. 3 as

1911

AMBAR ALI v. ANJAB ALI.

though he were a party in a civil case without any of the proceedings prescribed by law. The Rule is, therefore, made absolute as regards the petitioner No. 3.

The order has been made as against the petitioners Nos. 1 and 2 in their absence and without any notice to them. The Magistrate in his explanation says, perfectly correctly, that it is not necessary that any party should be heard in a case of revision by reason of section 440 of the Criminal Procedure Code. That, however, is not relevant to the present case which is a special matter to be proceeded with under section 437 of the Criminal Procedure Code, as to which the Court has laid down in the case of *Giridhari Marwari* v. *Emperor* (1) that such proceedings must not be without previous notice to the accused. The Rule, as regards the petitioners Nos. 1 and 2 also, is made absolute. The Rule is, therefore, made absolute and the order set aside.

Rule absolute.

E. H. M.

(1) (1908) 12 C. W. N. 822.

APPELLATE CIVIL.

Before Mr. Justice Stephen and Mr. Justice Coxe.

RAGHUBAR SAHI

v.

PROTAP UDOY NATH SAHI DEO.*

1911

Nov. 29.

Second appeal—Chota Nagpur Tenancy Act (Beng. VI of 1908), ss. 87, 224, 264—Civil Procedure Code (Act V of 1908) s. 100—Landlord and tenant.

No second appeal lies to the High Court from the decision of a Judicial Commissioner passed on appeal against the decision of a Revenue Officer under section 87 of the Chota Nagpur Tenancy Act.

SECOND APPEAL by the defendant, Raja Raghubar Sahi.

This appeal arose out of an action brought by the plaintiff, Maharaja Sree Protap Udoy Nath Sahi Deo, under section 87 of the Chota Nagpur Tenancy Act. The plaintiff's allegation was that pergannah Barway was granted by his father, Maharaja Jagannath Shahi Deo, to the father of the defendant, Lal Shahi, as a life *jagir*. A *potta* was granted to Lal Shahi, and a *kabuliat* was executed accordingly. On the death of Lal Shahi, the defendant was allowed to retain possession of the pergannah, but no fresh *potta* was granted to him, nor any *kabuliat* taken. He further alleged that the entry in the record-of-rights to the effect that the defendant's tenure was *putra-pautradika jagir* was incorrect, and therefore he brought the present suit under section 87 of the Chota Nagpur Tenancy Act in

* Appeal from Appellate Decree, No. 2485 of 1911, and Rule No. 5356 of 1911, against the decree of D. H. Kingsford, Judicial Commissioner of Chota Nagpur, dated July 13, 1911, reversing the decree of Bhuban Mohan Chatterjee, Assistant Settlement Officer of Ranchi, dated Aug. 31, 1910.

1911

RAGHUBAR SAHI v. PROTAP UDOY NATH SAHI DEO.

the Court of the Assistant Settlement Officer of Ranchi, for the correction of the said entry, on a declaration that the defendant's interest was that of a tenant-at-will or, at best, he had only a life interest in the tenure.

The defendant pleaded, *inter alia*, that he had a permanent and heritable interest in pergannah Burway.

The Court of first instance dismissed the plaintiff's suit. On appeal to the Judicial Commissioner, the decision of the Assistant Settlement Officer was reversed, and the suit was decreed.

Against this decision the defendant appealed to the High Court, and also obtained a Rule.

Mr. A. Chaudhuri (with him *Babu Jogesh Chandra Dey*), for the respondent, took a preliminary objection to the hearing of the appeal, on the ground that no second appeal lay to the High Court. The present suit was brought under section 87 of the Chota Nagpur Tenancy Act, and sub-section (*2*) provides that an appeal shall lie in the prescribed manner and to the prescribed officer from decisions passed under sub-section (*1*). Section 264, clause (*2*), sub-clause (*8*), empowers the Local Government to make rules for appeals against decisions in disputes under section 87 of the Act. The Local Government prescribed that appeals from decisions of Revenue Officers under section 87, cl. (*1*), would lie to the Judicial Commissioner. In the Bengal Tenancy Act, no doubt, a second appeal is allowed under section 109A of the Act against decisions in certain cases passed by the Revenue Officer under section 103B, which is similar to section 87 of the Chota Nagpur Tenancy Act, but no second appeal has been given under this Act against the decision passed on appeal by the Judicial Commissioner. It is a deliberate omission.

Mr. B. C. Mitter for *Mr. S. P. Sinha* (with him *Babu Provash Chander Mitter*, *Babu Surendra Madhub Mullick* and *Babu Harihar Prosad Sinha*), for the appellant. If the judgment of the Judicial Commissioner is the judgment of a Civil Court, then an appeal lies to the High Court, unless it is expressly taken away. Is the judgment of the Judicial Commissioner a judgment of the Civil Court? I submit, it is: see *Nilmoni Singh Deo* v. *Taranath Mukerjee* (1). If it is a judgment of the the Civil Court, then section 100 of the Code of Civil Procedure applies, and a second appeal would lie in this case to the High Court: see also *Hare Krishna Mahanti* v. *Bishun Chandra Mahanti* (2), *Kamaraiu* v. *The Secretary of State for India* (3), *Chaitan Patgosi Mahapatra* v. *Kunja Behary Patnaik* (4), and *Ram Lochan Singh* v *Beni Prasad Kumri* (5). The Legislature could not have intended the Judicial Commissioner's Court to be the final Court in matters dealt with under section 87 of the Act.

STEPHEN J. This matter comes before us on appeal and also on a Rule. The appeal was from a decree of the Judicial Commissioner of Chota Nagpur sitting on appeal from an order under section 87 of the Chota Nagpur Tenancy Act.

A preliminary objection is taken by the respondent that no second appeal lies in this case, and this contention, we think, must succeed. Sub-section (*2*) of section 87 of the Act enacts that an appeal shall lie in the prescribed manner, and to the prescribed officer, from decisions passed under sub-section (*1*). By an order of the Local Government which has power to

(1) (1882) I. L. R. 9 Calc. 295.
(2) (1908) 7 C. L. J. 426.
(3) (1888) I. L. R. 11 Mad. 309.
(4) (1911) I. L. 38 Calc. 832; 15 C. W. N. 863.
(5) (1908) I. L. R. 36 Calc. 252.

1911

RAGHUBAR SAHI v. PROTAP UDOY NATH SAHI DEO.

STEPHEN J.

act in this matter, the prescribed officer is the Judicial Commissioner, and it is argued that an appeal lying to him from a decision of a Revenue Officer there can be no second appeal. It is admitted that the provisions of section 100 of the Civil Procedure Code must be excluded either expressly or by implication. There is no express exclusion in this Act; but we think, on looking at the frame-work of this Act, that it is intended that no second appeal should lie to this Court. An appeal is provided for, as we have said, in sub-section (*2*) of section 87, and if there is to be a further appeal, we must then look to the provisions of section 224 of the Act, which says that "a second appeal shall lie to the High Court, under Chapter XLII of the Code of Civil Procedure, from any appellate decree passed by the Judicial Commissioner under this chapter, or from any order passed by him on appeal under section 215, sub-section (*3*)." We are of opinion that secti on 87 has been deliberately excluded from its scope. We are led further to this conclusion by a consideration of the provisions of the Bengal Tenancy Act from which this Act has been very closely adopted. Reading section 87 with section 106 of the Bengal Tenancy Act, it seems to us that it is by implication provided that there shall be no second appeal in cases arising under that section.

We, therefore, hold that there is no second appeal in this case. The appeal is dismissed with costs.

COXE J. I agree. It appears to me that clause (*2*), section 87, read with section 264, sub-section (*1*), clause *viii*, is tantamount to an express provision of law within the meaning of section 100 of the Code of Civil Procedure that these appeals should be heard by the prescribed officers, and should not be heard by

officers other than those. I only desire to state that in the case of *Mohunt Padmalav Ramanuja Das* v. *Lukmi Rani* (1), to which we have been referred, there is nothing that in any way limits the scope of section 106 of the Bengal Tenancy Act in so far as it relates to suits between landlord and tenant. The appeal is dismissed with costs.

1911

RAGHUBAR SAHI v. PROTAP UDOY NATH SAHI DEO.

COXE J.

[The Rule was also discharged.]

S. C. G. *Appeal dismissed.*

(1) (1907) 12 C. W. N. 8.

APPEAL FROM ORIGINAL CIVIL.

Before Sir Lawrence H. Jenkins, K.C.I.E., Chief Justice, and Mr. Justice Woodroffe.

JARAT KUMARI DASSI

v.

BISSESSUR DUTT.*

1911

July 18.

Probate—Will—Standard of proof—Testamentary capacity—Evidence as to execution—Presumption—Expert evidence, relevancy and weight of—Practice—Succession Act (X of 1865), ss. 46, 48, 50—Evidence Act (I of 1872), ss. 3, 10, 45, 101, 135.

The standard of proof to establish a will required by the Indian Statutes, is that of the prudent man and not an absolute or conclusive one.

The doctrine in *Tyrrell* v. *Painton* (1) and *Barry* v. *Butlin* (2), discussed.

Shama Churn Kundu v. *Khettromoni Dasi* (3), referred to.

The presumption against misconduct exists in a civil case, though it may be rebutted by a lower standard of proof than that in a criminal trial.

* Appeal from Original Civil, No. 33 of 1910, in suit No. 16 of 1909.

(1) [1894] P. 151.

(2) (1838) 2 Moo. P. C. 480.

(3) (1899) I. L. R. 27 Calc. 521; L. R. 27 I. A. 10.

1911

JARAT KUMARI DASSI v. BISSESSUR DUTT.

Cooper v. *Slade* (1), and *Devine* v. *Wilson* (2), referred to.

The admissibility, relevancy and weight of the evidence of experts, discussed.

Per WOODROFFE J. If the cross-examining counsel, after putting a paper into the hands of a witness, merely asks him some question as to its general nature or identity, his adversary will have no right to see the document, but if the paper be used for the purpose of refreshing the memory of the witness, or if any question be put respecting its contents or as to the handwriting in which it is written, a sight of it may then be demanded by the opposite counsel.

Peck v. *Peck* (3), referred to.

APPEAL by the petitioner, Sreemutty Jarat Kumari Dassi, from the judgment of Chitty J.

This appeal arose out of an application for probate of an instrument, dated the 27th June, 1909, and purporting to be the will of Gopessur Dutt. The two issues were: *first*, whether the signature to the instrument was that of Gopessur Dutt; and, *secondly*, in case it was his signature, whether when he placed it there he was of sound mind.

The family relations and the circumstances attending the illness and death of Gopessur are set out in the following extract from the judgment of Jenkins C.J.:—

"Gopessur Dutt died in the early hours of the 28th of June, 1909, at the age of 36 or thereabouts. He left a widow, the appellant Sreemutty Jarat Kumari Dassi, who seeks to propound the instrument in dispute. There was one daughter who died in infancy, but, apart from this, there was no child of the marriage. Gopessur was one of three brothers, the other two, both younger than him, being Bissessur, the caveator and respondent, and Parmessur.

(1) (1857) 6 H. L. Cas. 746, 772. (2) (1855) 10 Moo. P. C. 502, 531.
(3) (1870) 21 L. T. R. 670.

"It is admitted by counsel for the respondent, and is clear from the evidence, that Gopessur and Bissessur were not on terms of friendship, The relations between Gopessur and Parmessur, however, were good; for some time after they parted from Bissessur they lived together in the garden house that had been allotted them on partition, and though, shortly before his death, Parmessur had parted in mess and was building himself a separate house, this did not indicate any serious estrangement between these two brothers. Parmessur died in the autumn of 1908, and a month after his death his widow gave birth to a little boy, to whom Gopessur seems, not unnaturally, to have been attached. Gopessur fell ill in March, 1909, and, while there may have been temporary periods of improvement, he was never restored to health, though he passed through the hands of many and variously qualified medical attendants. At first his trouble seems to have been appendicitis, later dysentery supervened, and he ultimately died of bowel trouble. His earliest attendant was Dr. Chatterjee, the family physician, who also brought in for consultation three doctors of repute, but they do not seem to have satisfied the patient, for in May he placed himself under the homœopathic treatment of Dr. P. C. Mazumdar, a practitioner of good repute and standing. Shortly after this, Dr. P. C., Mazumdar, on leaving Calcutta, placed Gopessur under the treatment of his son, Dr. J. N. Mazumdar, and so things went on for some time.

"Then Gopessur consulted a Kaviraj, but as dysentery appeared on or about the 18th of June, Dr. J. N. Mazumdar was again summoned, and he attended him up to his death.

"On the 20th and 21st of June, Dr. D. N. Ray was called in for consultation, and there seems to have been a slight improvement in the patient's condition

1911

JARAT KUMARI DASSI v. BISSESSUR DUTT.

till the 25th, when he was not so well. On the 26th, he was seen both by Dr. P. C. Mazumdar, who had returned to Calcutta, and by Dr. J. N. Mazumdar. On the Sunday morning, they both saw him. On the evening of Sunday, the 27th, Dr. P. C. Mazumdar visited him about 5 or 5-30. Shortly after this, about 8 or 8-30 o'clock, Gopessur is alleged to have executed the will now propounded. Then he is said to have slept, but the pain becoming intense, Dr. J. N. Mazumdar was sent for. He was, however, unable to come, and in his place Dr. Goswami visited the patient and remained with him until his death, about 1 or 2 o'clock on the morning of the 28th. The same day the cremation took place, and on return from it the widow, according to her evidence, handed over to her brother, Sambhu Nath Sen, the will and certain drafts, which had been entrusted to her by her husband, and on the 29th in the morning they were delivered by him to Mr. Rutter, the family attorney, whose assistant he was."

By the alleged will, which was in the Bengali character, the wife was appointed sole executrix, and subject to a few legacies the whole of Gopessur's property was bequeathed to her absolutely and she was given a power of adoption. The effect of this would be to deprive Bissessur Dutt of the reversionary interest which would accrue to him in the event of an intestacy. The names of Sambhu Nath Sen and Hem Chandra Neogi appeared as attesting witnesses to this will.

It was the petitioner's case that the first time that the question of a will was seriously mooted was on the 19th June 1909, and on the 20th June Gopessur dictated his will to his sircar as it appeared in exhibit B. The same day this was fair copied into exhibit C. Certain alterations were made and a fresh copy made

that night, viz., exhibit D. All three copies were taken to Gopessur next morning and read by him, but nothing further was done at the time as his condition had improved, and exhibit D was finally signed and executed as Gopessur's will on the evening of the 27th June.

On the 11th August 1909, the widow applied for grant of probate of this will. Bissessur had entered a *caveat* on the 19th July, and on the 20th August he filed his affidavit in support of his *caveat*, stating as his grounds of objection to the issue of probate the following:—

"I have no personal knowledge as to whether the said alleged will is the last will of the said deceased, or as to whether it was duly and properly or at all executed by the said deceased or duly and properly attested as required by law, and if it was executed by the said deceased, under what circumstances it was done and whether the said deceased was in a disposable frame of mind and body, but so far as I have been able to ascertain from enquiries made, so far I verily believe that the said alleged will of the said deceased, dated 27th June 1909, is not and cannot be the will of the said deceased."

Thereupon, on the 31st August, 1909, the matter was set down as a contentious cause, and the proceedings took the form of a regular suit. The suit came on for hearing before Chitty J. on the 10th December, 1909, and lasted for 24 days. At first the case of the caveator was vague and indefinite, but after the Christmas vacation the will was denounced as a forgery: Sambhu Nath Sen was said to have forged Gopessur's signature, and the petitioner herself to have been a party to and have had a hand in the forgery.

On the question of the mental capacity of Gopessur the evidence on the part of the petitioner consisted of the testimony of the three doctors who were in actual attendance on Gopessur, viz., Dr. P. C. Mozumdar, Dr. J. N. Mozumdar and Dr. S. N. Goswami,

1911

JARAT KUMARI DASSI v. BISSESSUR DUTT.

the two attesting witnesses Sambhu Nath Sen and Hem Chander Neogy, the sircar Pran Nath Soor, and the petitioner. To this was opposed the evidence of the caveator, his nephew, two servants in Gopessur's service, who left in the course of the suit under suspicious circumstances, and Colonel Pilgrim, a doctor, who had never seen the deceased.

The petitioner's three medical witnesses, whose probity was unimpeached, testified that Gopessur's mental and testamentary capacity was unimpaired, and were not cross-examined on this point. Colonel Pilgrim on the other hand gave it as his opinion that the evidence of the former three doctors, as derived from copies of their deposition, was meagre and unsatisfactory.

On the question of the genuineness of the signature, there was in favour of the petitioner the direct evidence of the two attesting witnesses, the sircar and herself who all claimed to be eye-witnesses of the execution: there was also the testimony of Mr. Rutter, who expressed his belief that the signature was in the handwriting of Gopessur. In opposition to the execution was the evidence of the caveator and his nephew, both of whom were of opinion that the signature was not genuine, and the evidence of the two former servants of Gopessur. Babu Mohini Mohan Chatterjee, a solicitor, was called by the caveator as an expert in the Bengali language and writing, and gave it as his opinion that the person who dictated that will must have been possessed of some skill in drafting, and some literary culture in Bengali, together with some knowledge of Bengali conveyancing.

It was contended by the caveator that he was not on such unfriendly terms with Gopessur as to have induced the latter to exclude him from the will; but assuming that Gopessur would have so desired, there

was no reason why he should not have made Parmessur's son, of whom he was very fond, his heir. It was urged that Gopessur's illness had so affected his physical and mental powers as to render it impossible for him to execute or make a will. It was alleged the signature to the will had been forged by Sambhu Nath, and the Bengali date below the signature was in the handwriting of Jarat Kumari herself. Reliance was placed on the literary and legal form of the will, Gopessur having been a man of no literary attainments. It was also contended that the story of the three drafts of the 20th June was false and incredible.

Chitty J. in his judgment purported to apply the doctrine laid down in *Tyrrell* v. *Painton* (1) and *Barry* v. *Butlin* (2), and applied the test—

Is the evidence of the witnesses whom the petitioner has called to support her case so unimpeachable, so absolutely trustworthy in itself as by its own merit to dispose of all objections and allay all doubt and suspicion?

His Lordship concluded as follows:—

"Taking the evidence on both sides as a whole, I am of opinion that the petitioner has failed to make out her case. There are elements of doubt and suspicion which have not been removed. It is not necessary for me to express a definite opinion and to determine precisely where the truth lies. It would be difficult and indeed impossible to do so. It may be that there was some talk of Gopessur making a will. Gopessur may have intended to do so. On the other hand the signature may be a forgery pure and simple. It may be that a will was prepared and Gopessur's signature obtained when he was in a moribund condition, and so not capable of knowing what he was doing. There are various other possibilities. All that I can or need say is that the propounder has failed in the words of Parke B. to 'satisfy the conscience of the Court that the instrument propounded is the last will of a free and capable testator.' Probate must therefore be refused."

From his judgment and order the petitioner, Jarat Kumari Dassi, appealed.

(1) [1894] P. 151. (2) (1838) 2 Moo. P. C. 480.

1911

JARAT KUMARI DASSI v. BISSESSUR DUTT.

Mr. Jackson, *Mr. Zorab* and *Mr. B. L. Mitter*, for the appellant.

Mr. S. P. Sinha, *Mr. S. R. Das* and *Mr. B. C. Mitter*, for the respondent.

Cur. adv. vult.

JENKINS C.J. [After setting out the facts, his Lordship continued:] I propose here to examine the judgment under appeal. The key to the decision is, I think, this: there are a number of circumstances which in the opinion of the learned Judge create suspicion: the occasion for suspicion has not been removed: therefore the will has not been proved.

In so handling the case the learned Judge professed to be guided by *Tyrrell* v. *Painton* (1). As I understand that decision it laid down no new principle, but it merely applied a well established principle to an exceptional set of circumstances. That principle was enunciated in *Barry* v. *Butlin* (2), where it was said: "The rules of law according to which cases of this nature are to be decided do not admit of any dispute so far as they are necessary to the determination of the present appeal, and they have been acquiesced in on both sides. These rules are two: The first, the *onus probandi* lies in every case upon the party propounding a will, and he must satisfy the conscience of the Court that the instrument so propounded is the last will of a free and capable testator. The second is, that if a party writes or prepares a will under which he takes a benefit, that is a circumstance that ought generally to excite the suspicion of the Court, and calls upon it to be vigilant and jealous in examining the evidence in support of the instrument, in favour

(1) [1894] P. 151.

(2) (1838) 2 Moo. P. C. 480.

of which it ought not to pronounce unless the suspicion is removed, and it is judicially satisfied that the paper propounded does express the true will of the deceased."

The effect of this decision is tersely stated by Lord Davey, as he afterwards became, in *Tyrrell* v. *Painton* (1), where he said: "The principle is that wherever a will is prepared under circumstances which raise a well-grounded suspicion that it does not express the mind of the testator, the Court ought not to pronounce in favour of it unless the suspicion is removed."

The suspicion to which allusion is made must, I think, be one inherent in the transaction itself, and not the doubt that may arise from a conflict of testimony which becomes apparent on an investigation of the transaction.

Now, while I willingly concede the value to us of these decisions, it must not be forgotten that the law is laid down for us in clear and imperative terms by Acts of the Indian Legislature, and it is by the provisions of those Acts that we must be guided. Gopessur was a Hindu, and the law applicable to any will alleged to have been executed by him is to be found in the Hindu Wills Act, which incorporates the sections of the Succession Act to which I will refer.

By section 46 of the Succession Act it is provided that every person of sound mind and not a minor may dispose of his property by will. In Explanation 4 to this section it is said that no person can make a will while he is in such a state of mind, whether arising from drunkenness, or from illness, or from any other cause that he does not know what he is doing. A light is thrown on the meaning of the section by the illustrations appended to it.

(1) [1894] P. 151, 159.

1911

JARAT KUMARI DASSI v. BISSESSUR DUTT.

By section 48 it is provided that a will or any part of a will the making of which has been caused by fraud or coercion or by such importunity as takes away the free agency of the testator is void.

Section 50 prescribes the rules for the execution of unprivileged wills, and enjoins (among other things) that the testator shall sign the will; that his signature shall be so placed that it shall appear that it was intended thereby to give effect to the writing as a will; and that it shall be attested by two or more witnesses.

So much then for the conditions necessary for a valid will. Next we have to see how the existence of those conditions is to be established. For this I turn to the Evidence Act, which declares by section 3 that a fact is said to be proved when, after considering the matters before it, the Court either believes it to exist, or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists. The disproof of a fact is similarly treated. It appears to me that the learned Judge has required a higher standard of proof than the law prescribes. Thus at one place he says—"but even so it cannot be said that there is no doubt regarding Gopessur's possession of the requisite mental activity at the point of time in question;" again, in discussing the signature on the will he says: "It is therefore impossible to express a decided opinion on this point;" and he ultimately formulates his attitude towards the problem before him in these words: "The question is—Is the evidence of the witnesses whom he has called to support her case so unimpeachable, so absolutely trustworthy in itself, as by its own merit, to dispose of all objections and allay all doubt and suspicion?" But the materials on which Courts have to pronounce are

necessarily imperfect; for apart from the inherent uncertainty of human affairs, the presentment of them to a tribunal is ordinarily the outcome of faulty observation, defective memory, inaccurate description and natural bias, and even that is blurred here by the intervention of interpretation.

Demonstration, or a conclusion at all points logical, cannot be expected, nor can a degree of certainty be demanded of which the matter under investigation is not reasonably capable. Accepting the external test which experience commends, the Evidence Act, in conformity with the general tendency of the day, adopted the requirements of the prudent man as an appropriate concrete standard by which to measure proof.

The Evidence Act is at the same time expressed in terms which allow full effect to be given to circumstances or conditions of probability or improbability, so that where, as in this case, forgery comes in question in a civil suit, the presumption against misconduct is not without its due weight as a circumstance of improbability, though the standard of proof to the exclusion of all reasonable doubt required in a criminal case may not be applicable: *Cooper* v. *Slade* (1) and *Devine* v. *Wilson* (2).

I have dealt with this topic in some detail, as, at first blush, it would almost appear as though we are asked to dissent from the learned Judge's appreciation of the evidence, and that I should hesitate to do in the absence of very strong circumstances justifying such a course. What we have to see in this case is whether, after considering the matters before us, the Court ought to believe the two main facts alleged by the petitioner, or to consider them

(1) (1857) 6 H. L. Cas. 746, 772. (2) (1855) 10 Moo. P. C. 502, 531.

1911

JARAT KUMARI DASSI v. BISSESSUR DUTT.

JENKINS C.J.

so probable that a prudent man ought, in the circumstances of this particular case, to act upon the supposition that they are true. These two facts alleged are, first, that Gopessur was of sound mind at the time of the alleged execution of his will, and, secondly, that he in fact duly executed his will.

First I will deal with the problem whether he was mentally capable of making the will propounded, bearing in mind that, for this purpose, it is on the petitioner to establish affirmatively that he was at or about 8 or 8-30 on the evening of the 27th of June, 1909, of sound mind, and not in such a state of mind from illness or any other cause that he did not know what he was doing (section 46 of the Indian Succession Act). If the story of the preparation of the will be accepted, a lower standard of capacity would be requisite: *Pereira* v. *Pereira* (1); still I propose to discuss the evidence in the first place without reference to the view that Gopessur had a prior knowledge of the contents of the alleged will.

[His Lordship then dealt with the evidence of the petitioner's medical witnesses, commenting on the circumstance that they were not cross-examined as to Gopessur's mental condition.]

I pause here to say that, though these three witnesses may be experts, their evidence in this case has not been that of experts, but of men who had observed relevant facts, and whose evidence derives an enhanced value from the circumstance that they had favourable opportunities, peculiar facility and obvious incentive for accurate observation, and that their training would fit them to appreciate and describe what they observed.

(1) [1901] A C. 354.

At this point, it will be convenient to consider the evidence of the medical man who was called by the caveator by way of counterblast.

He is Colonel Pilgrim, also a medical man of repute in Calcutta, but without the advantage of having seen Gopessur. He comes before the Court as an expert pure and simple, and without discussing the argument as to the characteristics of this type of remunerated witnesses, or determining how far he is merely to be regarded as a man who is paid a retainer to make a sworn argument, it is impossible to get away from the fact that he labours under a disadvantage to which his medical brethren, if the difference of schools permits this description, were not subject. They saw the patient; he did not. The learned Judge seems to have read the expert's evidence as supporting his own view that the evidence of the three doctors was meagre and unsatisfactory in the extreme.

But it is important to see what was the question that elicited from the expert, the reply to which the learned Judge apparently alludes.

This is the question that had such momentous consequences—

"How would you describe the clinical picture such as it is that is presented by the evidence of the three doctors?

A. Meagre and incomprehensible."

But as I read the evidence of the three doctors, they did not profess to paint a "clinical picture," whatever that may mean, but as plain honest men to give a true and plain account of Gopessur's mental condition on or about the 27th June 1909, as it appeared to them. Had they been required to paint a clinical picture for the expert's purposes, I see no reason to suppose they would have been incapable of responding to the demand.

1911

JARAT KUMARI DASSI v. BISSESSUR DUTT.

JENKINS C.J.

To clinch the matter, counsel put this question to his expert—

"*Q.* Upon the meagre and incomprehensible clinical picture presented by the evidence of the doctors are you able to form a clear, satisfactory and convinced opinion as to the mental condition of the patient during, say, the last eight hours of his life?

A. No, I am not.

Q. Or during the last 8 or 10 days of his life?

A. No, I am not."

So much the worse for the expert; but I fail to see how this discredits the evidence of facts given by the three doctors.

[His Lordship then dealt with other evidence on the first issue.]

The conclusion then to which I come, on the best consideration I have been able to give to the case, is that on the 27th of June, at the time when Gopessur was alleged to have executed the will, he was of sound mind, and that, though very feeble and debilitated, he was capable of knowing what he was doing and of exercising a judgment as to the proper mode of disposing of his property.

Then, was the instrument now propounded in fact executed by Gopessur?

[His Lordship then examined the evidence on the question of execution:]

In my opinion of the evidence directly bearing on the question whether Gopessur executed his will on the 27th June as alleged by the petitioner, there is a distinct preponderence in favour of its execution. Is there then anything in the probabilities of the case that disturbs this preponderance?

[In dealing with the probabilities of the case, his Lordship considered the relations between Gopessur and Bissessur, the absence of internal evidence of

forgery, the purport of the will, *Dowlat Koer* v. *Ramphul Das* (1), and the nature and preparation of the three drafts of the 20th June.]

The conclusion to which I come is that the story of the three documents is in the main true, and though Sambhu Nath may not have been so detached as the evidence would make out, I hold that exhibits B, C and D were written out as the witnesses describe, and that Gopessur was responsible for them, and knew and understood their contents. His mental capacity at that time has not been questioned, so that had it been necessary, it would have been open to the petitioner to rely on the doctrine recognised in *Pereira* v. *Pereira* (2).

It now only remains for me to express the view I take of the whole case. The weight of evidence in my opinion is strongly in the petitioner's favour, both as to Gopessur's mental condition and the fact of execution. Though there are matters on which there is room for doubt, I am unable to regard the probabilities as opposed to the case made by the petitioner; rather otherwise. Moreover, the mere improbability of this or that in so complex a transaction as that under consideration cannot go for much against the clear and distinct evidence of witnesses of good general character, and, after all, probability and improbability of the type with which we are here concerned is apt to become a matter of speculation and prediliction, for different persons act differently in similar circumstances. And much of that which has been classed as improbable in this case comes to little more than a failure to observe a higher standard of precaution and to do the wisest and safest thing under the circumstances.

(1) (1897) I. L. R. 25 Calc. 459. (2) [1901] A. C. 354.

1911

JARAT KUMARI DASSI v. BISSESSUR DUTT.

JENKINS C.J.

The conclusion then to which I come is that Gopessur did sign Exhibit D on the evening of June 27th as alleged by the petitioner, that he intended by so signing to give effect to the writing as his last will, that at the time he was of sound mind and capable of exercising a judgment as to the proper mode of disposing of his property, and that he knew what he was doing. No dispute was raised before us as to the legality of the attestation.

The judgment of Chitty J. should, therefore, be reversed, and a grant of probate made to the petitioner, Sreemutty Jarat Kumari Dassi. The costs of the suit and appeal throughout must be borne by the respondent, Bissessur Dutt.

WOODROFFE J. A considerable number of decisions have been cited upon the question of the nature of the proof required in the case of wills. In my opinion a reference to them is unnecessary, for I am not aware that a probate case is in any respect singular, as regards the application of the general principles of proof. Those general principles have been stated in the Evidence Act to be as follows :—

"Whoever desires any Court to give any judgment as to any legal right or liability dependent on the existence of facts which he asserts, must prove that those facts exist" (Evidence Act, section 101). In this case we are asked to give judgment as to the existence of the will propounded and as to the legal right which follow such a conclusion. Section 3 shows the meaning of proof to be that the fact (in this case the will) is proved when the Court, after considering the matters before it, either believes it to exist or considers its existence so probable that a prudent man ought, *under the circumstances of the particular case*, to act upon the supposition that it exists. Each case must

therefore be determined on its own facts. Upon however the decisions cited I would observe that the rule in *Tyrrell* v. *Painton* (1) applies in my opinion to cases where the circumstances of suspicion arise from the nature of the case as put forward by the propounder. In such cases the propounder must remove the suspicion which his own case creates. Where, however, the alleged suspicion against a will arises from facts which form part of the impugnant's case then the Court must see whether the facts which are said to give rise to the suspicion are proved or whether the plaintiff's case is proved. The rule therefore does not apply where the question is simply which set of witnesses should be believed: *Shama Churn Kundu* v. *Khettromoni Dasi* (2). In the present case the defendant puts forward (though in an uncertain way and at a late period of the case) a charge of forgery. This the learned Judge has found to be not established.

Of the defendant's eight witnesses, the first and last are formal. The learned Judge does not accept the caveator's evidence, nor that of the two former servants. He does not, at one passage at least, consider Colonel Pilgrim's evidence necessary for his decision, though on other points he does refer to it. The bulk of Colonel Pilgrim's evidence was irrelevant. He stated that he was unable to pronounce an opinion either as to the cause of death or as to the physical and mental condition of the alleged executant. This admission substantially disposes of his evidence. Other portions of his testimony are inadmissible as being mere advice to the Court on the evidence and outside the opinion rule; or, if admissible in form, are not in the present circumstances of value or relevant. This testimony appears to have been

(1) [1894] P. 161.

(2) (1899) I. L. R. 27 Calc. 521; L. R. 27 I. A. 10.

1911

JARAT KUMARI DASSI v. BISSESSUR DUTT.

WOODROFFE J.

given not after hearing the evidence, but on a copy of the deposition. It has been objected that this in itself makes the evidence inadmissible. I do not agree, though I think the better course to follow where expert testimony is given is that the expert should hear the evidence as to which he is asked his opinion. There remain the two witnesses, Mohini Mohan Chatterjee and Gora Chand Mullick. As regards the first, it was contended that he was not expert. It is however quite clear in my opinion that he is expert on questions relating to the Bengali language which is his own (including Bengali legal terms) and Sanskrit which he has studied. It is essential, however, to distinguish the rule of qualification founded on experience of the witness, and that which permits him to advise the Court with an opinion. Every witness must be fitted or expert in the matter upon which he gives his supposed knowledge. In some cases, viz., where the witness is "expert" in the narrower sense, his competency must be specially shown. The question however whether besides deposing to facts he is to be permitted to express his opinion, is another matter. In each case therefore it must be asked: Is the matter one upon which the witness is sufficiently qualified by experience; and if he is, is it a matter upon which the witness is permitted to assist the Court with his opinion? This must be (section 45, Evidence Act) a matter of foreign law, science and art, handwriting and finger-impressions. It would be relevant in this case to prove by the evidence of persons who knew him that the testator was of limited education and without literary and legal attainment, and then that the alleged will was written in literary Bengali and contained terms of a peculiar literary or technical legal character, and on these facts to invite the Court to say that the will was not written by the

deceased. His evidence, however, in parts goes beyond this, and where it does is inadmissible as where he was asked to express an opinion as to the literary skill and culture and legal knowledge of the deceased. The learned Judge states that his evidence raises a grave doubt whether the will was the exclusive composition of the alleged testator as the petitioner's witnesses assert. As regards Gora Chand Mullick, the learned Judge, after stating that he is a partisan of Bissesswar and that portions of his evidence are hard to believe, says that he is inclined to think that his story as to the deceased's physical condition is substantially correct. These two are practically the only conclusions (though it may be doubted whether they amounted even to that) which are held to be established by the defendant's evidence.

The questions then became simply this: Had the plaintiff under these circumstances made out his case. The learned Judge has held that he has not, because he thinks that there are elements of doubt and suspicion which have not been removed.

Before dealing with this there are two points of evidence which arise upon the defendant's case as to which I desire to express my opinion. As regards Bissessur, the learned Judge points out that he abstained from going into the witness-box until all his witnesses other than the experts and formal witnesses had given evidence. The Court might and, I venture to say under the circumstances of this case, should have directed that the caveator be examined earlier, if not (as would have been proper) in the first place. The Court has always power to do this under section 135 of the Evidence Act.

Next, in re-examination of the witness Gora Chand, an unproved copy of a statement briefed to counsel of his evidence was put into his hands and he was

1911

JARAT KUMARI DASSI v. BISSESSUR DUTT.

WOODROFFE J.

asked whether it correctly represented the substance of what he had told the caveator's attorney. The question, though objected to, was allowed and answered affirmatively. It is not necessary to consider whether it was admissible, as the document itself was subsequently rejected. I would observe, however, that the Court could not assume that the document was proved from the refusal of opposing counsel to cross-examine to it. The latter was entitled to wait until the Court ruled whether the document had been proved or not. A question has arisen in connection with this as to the right of counsel to inspect a document which opposing counsel has put in the hands of a witness. The rule on this point appears to be correctly stated in Taylor on Evidence, 1452, as follows: "On the whole the practice seems to be that if the cross-examining counsel, after putting a paper into the hands of a witness, merely asks him some question as to its general nature or identity, his adversary will have no right to see the document, but that if the paper be used for the purpose of refreshing the memory of the witness or if any questions be put respecting its contents or as to the handwriting in which it is written [as in *Peck* v. *Peck* (1) cited to us in argument], a sight of it may then be demanded by the opposite counsel."

[His Lordship then dealt with the evidence, and concurred in decreeing the appeal.]

Appeal allowed.

Attorneys for the appellant: *Rutter & Co.*

Attorneys for the respondent: *G. C. Chunder & Co.*

J. C.

(1) (1870) 21 L. T. R. 670.

CIVIL RULE.

Before Mr. Justice Mookerjee and Mr. Justice Carnduff.

LANGAT SINGH

v.

JANKI KOER.*

1911

Aug. 28.

Decree, amendment of—Clerical or arithmetical mistake—Whether successive applications for amendment of decree maintainable—Civil Procedure Code (XIV of 1882), ss. 13, 206—Inherent power of Court.

A Court is competent to entertain successive applications for amendment of clerical or arithmetical mistake in a decree, or of error arising therein from any accidental slip or omission. Such applications for amendment of a decree are not barred by the rule of *res judicata*. But if an application for amendment has been heard and disposed of on the merits, a subsequent application may not be maintained in the same matter, and it may be barred upon general principles of law.

The power to amend a decree so as to correct a clerical or arithmetical mistake therein, or an error arising from an accidental slip or omission, is inherent in every Court and may be exercised at any time the error is discovered, although the Court cannot exercise such power unless the error is of the description mentioned in section 206 of the Code of 1882.

RULE obtained by Langat Singh, assignee of the decree-holder.

One Shyam Sivendra Shahi brought a suit in 1899 against the opposite party, Maharani Janki Koer, for recovery of jewelleries and other valuable articles, on the allegation that the property belonged to his deceased wife, in the Court of the Subordinate Judge of Motihari. The matter was referred to arbitration of two gentlemen, and the arbitrators not being unanimous gave two separate awards on the 13th and 14th of July, 1901. According to the terms of submission it

* Civil Rule, No. 2617 of 1911, against the order of Khetra Lal Sinha, Subordinate Judge of Muzaffarpur, dated March 16, 1911.

1911

LANGAT SINGH v. JANKI KOER.

was then referred to Mr. Grouse, Collector of Saran, who made his award on the 7th September, 1901. The learned Subordinate Judge passed a decree in accordance with the award of the umpire on the 22nd of November, 1901. The decree stated that the claim of the plaintiff was decreed as per award of the umpire and the arbitrators in the manner specified. It appeared that the arbitrators and the umpire attached lists of properties in their award. In 1902, the decree-holder applied for delivery of articles as given in the different lists as if they were distinct articles. The judgment-debtor opposite party stated that when the decree was drawn up a confusion was made between the different lists, and properties were mentioned twice as if they were distinct and separate; and on the 26th of November, 1902, the judgment-debtor applied for amendment of the decree under section 206 of the Code of Civil Procedure. The learned Subordinate Judge refused the application on the 7th February, 1903, on the ground that it had not been explained to him how the decree was contrary to the judgment. On the very same date an applicatin for the review of the order of dismissal was made by the judgment-debtor, and it was also rejected by his successor in office on the 16th of May, 1903. Thereupon, on the 21st of May, 1903, the judgment-debtor filed another application for amendment of the decree, and the learned Subordinate Judge rejected it on the 12th December, 1903, on the ground that an amendment was unnecessary. Thereafter the decree-holder applied for execution of the decree on the 10th of September, 1904. The learned Subordinate Judge holding that the decree-holder was entitled to articles mentioned in the lists referred to in the decree, allowed the execution to proceed on the 21st of August, 1905. On the day

following, the judment-debtor presented a fresh application for amendment of the decree; he also preferred an appeal to the High Court against the decision of the Subordinate Judge in the execution case. By an order of the High Court, the hearing of the application for amendment of the decree was postponed till the disposal of the appeal by this Court. On the 23rd of January, 1907, the appeal to the High Court was dismissed. The application for amendment of the decree was then taken up by the learned Subordinate Judge; and on the 16th of March, 1911, he granted the application for amendment, and directed the words "arbitrators and" and "list A_1 to A_{12}" be expunged. It appeared that the petitioner Langat Singh purchased the decree on the 16th of October, 1908, from the decree-holder Shyam Shivendra Shahi aforesaid, and he was brought upon the record.

Against that order of the Subordinate Judge granting the application for amendment, the petitioner moved the High Court and obtained this Rule.

Mr. S. P. Sinha, *Babu Mohendra Nath Roy* and *Babu Luchmi Narain Sinha*, for the petitioner.

Dr. Rash Behary Ghose, *Babu Ram Charan Mitter* and *Babu Dwarka Nath Mitter*, for the opposite party.

Cur. adv. vult.

MOOKERJEE AND CARNDUFF JJ. We are invited in this Rule to set aside an order by which the Court below has amended a decree made on the 14th December, 1901. The order of the Subordinate Judge is assailed on the ground that it was made without jurisdiction, inasmuch as two previous applications, similar in scope and character to the present, had been refused. The circumstances under which the order in question has been made may be briefly recited. In 1899, Babu Shyam Sivendra Shahi, husband of the

1911

LANGAT SINGH v. JANKI KOER.

sister of Maharajah Harendra Kishore Singh of Bettia, commenced an action against Maharani Janki Koer for recovery of jewelleries and other valuable articles, alleged to be the property of his deceased wife. The matters in controversy in the suit were referred to two arbitrators, Mr. Hall and Babu Jagneshwar Prasad Singh. The arbitrators were not unanimous, and gave divergent awards on the 13th and 14th July, 1901. The matter was thereupon referred, in terms of the submission, to Mr. Grouse, Collector of Saran, who made his award on the 7th September, 1901. The Subordinate Judge accepted the award of the umpire and directed on the 22nd November, 1901, that a decree be drawn up in accordance therewith. When the decree was drawn up, however, it stated that the claim of the plaintiff was decreed as per award of the arbitrators and the umpire in the manner specified. It is necessary to explain at this stage that one of the arbitrators, Mr. Hall, in his award, made mention of a Hindi list (Exhibits B to B_7) of the articles which Maharani Janki Koer admitted to have received from Benares, where the wife of the plaintiff had died. A translation of this list was attached to the written statement and was called list A. The other arbitrator, Babu Jagneshwar Singh, mentioned three lists, A, B and C. Twelve other lists appear to have been prepared (Exhibits A_1 to A_{12}) which, it is said, merely enumerated articles mentioned in the Hindi list (Exhibits B to B_7) or in the English version thereof (Exhibit A). The umpire allowed the plaintiff properties included in the Hindi list (Exhibits B to B_7). When the decree in the suit came to be drawn up, it is asserted by the defendant, a confusion was made between the different lists, and properties were mentioned twice as if they were distinct and separate. This error, it is suggested, was

due to the fact that although the Subordinate Judge had passed judgment in accordance with the award of the umpire, the decree, as drawn up, was on the basis of the award of the umpire as also those of the arbitrators who had recorded divergent awards. This decree was drawn up on the 14th December, 1901. In 1902, the decree-holder applied for delivery of the articles both of list A and of lists A_1 to A_{12} as if they were distinct articles. The result was that on the 26th November, 1902, the judgment-debtor applied for amendment of the decree. On the 7th February, 1903, the Subordinate Judge refused the application on the ground that it had not been explained to him how the decree was contrary to the judgment. It has been stated in the affidavit filed on behalf of the judgment-debtor in this Court, that this arose from the circumstance that the proceedings had been transferred from Motihari to Chapra, and the new pleader at the latter Court had no opportunity allowed to him to receive instructions from the judgment-debtor. On that very date, the judgment-debtor applied for a review of the order of dismissal, but on the 16th May the application for review was refused on the ground that the successor of the Subordinate Judge who had made the order was not competent to review it. Thereupon, on the 21st May, 1903, the judgment-debtor presented a fresh application for amendment. That application was dismissed on the 12th December, 1903, because in the opinion of the Subordinate Judge an amendment was unnecessary. He held in substance that the enumeration of the two sets of duplicate lists in the decree was a mere surplusage, not calculated to mislead anybody. The decree-holder thereafter on the 10th September, 1904, applied for execution of the decree. The Subordinate Judge held on the 21st August, 1905, that

1911

LANGAT SINGH v. JANKI KOER.

the decree-holder was entitled to the articles in both sets of lists or their value, though he was of opinion that one set of lists was merely a duplicate of the other and only one set of articles was in existence. The Subordinate Judge came to this remarkable conclusion, because he felt himself bound by the decision in the previous execution case as to the meaning of the decree, on the principle explained by the Judicial Committee in *Mungul Pershad Dichit* v. *Grija Kant Lahiri* (1) and *Ram Kirpal Shukul* v. *Rup Kuari* (2). The Subordinate Judge further held that although the interpretation of the lists accepted by his predecessor was correct on the facts, yet as the decree had not been amended, he was powerless to do justice between the parties. On the day following the delivery of this judgment, the judgment-debtor presented a fresh application for amendment of the decree. On the 22nd November, 1905, the judgment-debtor also lodged an appeal in this Court against the order of the Subordinate Judge in the execution case. The result was that the hearing of the application for amendment was adjourned pending the hearing of the appeal by this Court. On the 23rd January, 1907, a Divisional Bench of this Court (Mitra and Caspersz, JJ.) dismissed the appeal. The learned Judges held that it was not competent to the execution Court to ignore the order of the 26th November, 1902, and that the only remedy of the judgment-debtor was either to have the decree amended or a proper decree drawn up. The application of the judgment-debtor made on the 22nd August, 1905, which had so long awaited the decision of the High Court in the execution appeal, was now taken up, but on account of circumstances over which the parties had

(1) (1881) I. L. R. 8 Calc. 51. (2) (1883) I. L. R. 6 All. 269; L. R. 11 I. A. 37.

no control, the matter could not be considered till the 16th March, 1911. On that date, the Subordinate Judge granted the application for amendment and directed that the words "arbitrators and" and "lists A_1 to A_{12}" be expunged. We are now invited by an assignee of the decree, who was made a party to the proceedings in the Court below and who is now the decree-holder for all practical purposes, to discharge this order on the ground that, as two successive applications for amendment of the decree had been refused, it was not competent to the Subordinate Judge to entertain a third application in the same matter. This position has been strenuously controverted on behalf of the judgment-debtor, and it has further been argued that as the decision of the Subordinate Judge is right on the merits and has done justice long deferred, this Court ought not to interfere in the exercise of its revisional powers. It has finally been suggested that even if the decision was open to attack on the merits, it could at best be treated as erroneous in law, and consequently not liable to be reviewed by us in the exercise of our revisional powers.

The question raised as to the competency of a Court to entertain successive applications for amendment of a clerical or arithmetical mistake in a decree or of error arising therein from any accidental slip or omission is apparently of first impression in so far as this Court is concerned. It has been argued by the learned vakil for the judgment-debtor that section 13 of the Civil Procedure Code of 1882 has no application to a case of this character, inasmuch as an application for amendment of a decree can in no sense be treated as a "suit" within the meaning of section 13. He has placed reliance, in support of this view, upon the decision in *Eliza Smith* v. *Secretary of State* (1)

(1) (1878) I. L. R. 3 Calc. 340.

1911

LANGAT SINGH v. JANKI KOER.

where an application under section 63 of the Administrator-General's Act (II of 1874) was deemed to be barred by the disposal of a former application in the same matter, because such application was of the nature of a 'suit' within the meaning of the Civil Procedure Code. It may be conceded that successive applications for amendment of a decree are not barred by section 13 of the Code of 1882, because an application for amendment is not a 'suit' within the meaning of that section. It does not follow, however, that if an application for amendment has been heard and disposed of on the merits, a subsequent application may be maintained in the same matter. The subsequent application may be barred, not upon section 13, but upon general principles of law. The decision of their Lordships of the Judicial Committee in *Ram Kripal Shukul* v. *Rup Kuari* (1) and *Beni Ram* v. *Nanhu Mal* (2) indicate that an interlocutory judgment may be as binding upon the parties as a final judgment, on the principle that if it were not binding there would be no end to litigation. When, therefore, upon an application for amendment of a decree there has been an adjudication on the merits, the view may well be maintained that the decision is conclusive between the parties, notwithstanding the inapplicability of section 13 of the Code of 1882. Different considerations, however, obviously arise when an application for amendment of a decree has been dismissed without adjudication on the merits, either because of default of the petitioner or because the Court thought that an amendment was needless. The question arises, whether there is any statutory provision or recognised principle of law upon which a second application ought not to be

(1) (1883) I. L. R. 6 All. 269; L. R. 11 I. A. 37.

(2) (1884) I. L. R. 7 All. 102; L. R. 11 I. A. 181.

entertained under circumstances like these. It is obvious that section 102 of the Code of 1882 does not by its terms present a bar in cases of this description. On the other hand, instances are by no means rare in which successive applications have been allowed in matters in which there is no statutory bar, provided there has been no adjudication on the merits upon a previous application. In *Thakur Pershad* v. *Sheikh Fakirullah* (1) it has been ruled by the Judicial Committee that the mere fact that an application for execution of a decree had been dismissed for default did not bar a subsequent application: see also *Asim Mandal* v. *Raj Mohan Das* (2). *In Ramani Debi* v. *Kumud Bandhu Mukerjee* (3) it was ruled by this Court that the dismissal for default of an application for probate does not debar a second application for probate. The cases of *Nusseerooddeen Khan* v. *Indur Narain Chawdhry* (4) and *Gobinda Ram Mondal* v. *Bhola Nath Bhatta* (5) furnish instances of cases in which a second application for review was entertained after a previous application for review had been made and rejected. A similar doctrine is recognised in the decision of this Court in *Mussummut Gulab Koer* v. *Badshah Bahadur* (6), where it was ruled that a suit might lie to set aside a consent decree on the ground of fraud, although an application for review on the same ground had been unsuccessful. The principle which underlies these decisions militates against the view that an application for amendment of a decree cannot be entertained because a previous application has been dismissed for default or as superfluous. Indeed, the learned Judges of the Madras High

(1) (1894) I. L. R. 17 All. 106; L. R. 22 I. A. 44.
(2) (1910) 13 C. L. J. 532.
(3) (1910) 12 C. L. J. 185.
(4) (1866) B. L. R. Sup. Vol. 367; 5 W. R. 93.
(5) (1888) I. L. R. 15 Calc. 432.
(6) (1909) 10 C. L. J. 420, 447.

1911

LANGAT SINGH v. JANKI KOER.

Court in *Jivraii* v. *Pragji* (1), assumed that if an application for amendment has been dismissed for default, there is nothing to prevent the Court from hearing another application in the same matter. In our opinion, this view is sound on principle. The position is substantially strengthened if we remember that, apart from statutory provisions, the Court has inherent power to vary or amend its own decree or order, so as to carry out its own meaning. As was observed in *Mellor* v. *Swire* (2), when a Court does so, it merely exercises a power to correct a mistake of its ministerial officer by whom the decree or order was drawn up, for it is incumbent on the Court to insist that the decree drawn up in its office should correctly express the judgment of the Court: *In re Saint Nazaire Co.* (3), *Preston Banking Co.* v. *Allsup* (4). To the same effect are the emphatic observations of Lord Penzance in *Lawrie* v. *Lees* (5) and of Lord Watson in *Hatton* v. *Harris* (6) that every Court has the power to vary the order drawn up mechanically in its office, so as to carry out its own meaning and to bring the record into harmony with the order which the Judge obviously meant to pronounce. The same principle has been recognised in judicial decisions in this country: *Paramesh Raya* v. *Sesha Giriappa* (7), *Toona* v. *Kurreemun* (8). It has further been held that such power of amendment may be exercised at any time, and it was ruled in *Shivapa* v. *Shivpanch Lingapa* (9) that an application under section 206 of the Code of 1882 was not governed by any limitation and could be made at any time the errors in the decree were

(1) (1886) I. L. R. 10 Mad. 51.
(2) (1885) 30 Ch. D. 239.
(3) (1879) 12 Ch. D. 88.
(4) [1894] 1 Ch. 141.
(5) (1881) 7 App. Cas. 19.
(6) [1892] A. C. 547.
(7) (1899) I. L. R. 22 Mad. 364.
(8) (1886) 6 W. R. (Mis.) 31.
(9) (1886) I. L. R. 11 Bom. 284.

discovered. In England, amendments have been allowed even after the lapse of many years from the date when the decree was drawn up, on the principle stated by Lord Macnaghten in *Hatton* v. *Harris* (1) that lapse of time has nothing to do with the question of amendment: see also *Shipwright* v. *Clements* (2), and *Loughrey* v. *Swan* (3). It is obvious, therefore, that the power to amend a decree so as to correct a clerical or arithmetical mistake therein or an error arising from an accidental slip or omission is inherent in every Court and may be exercised at any time the error is discovered, although the Court cannot exercise such power unless the error is of the description mentioned in section 206 of the Code of 1882 [*Raiah Katagiri Venkata Subbamma Roy* v. *Rajah Vellanki Venkatrama Rao* (4)], and although the Court may deem it inexpedient or inequitable to exercise its powers where third parties have acquired rights under the erroneous decree without a knowledge of the circumstances which would tend to show that the decree was erroneous: *Hatton* v. *Harris* (1). This principle is manifestly inconsistent with the position that because an application for amendment has been dismissed for default or as superfluous, the Court is powerless to set matters right and to rectify its own records upon a subsequent application by the party interested. We are not much impressed by the argument that an unscrupulous litigant may, time after time, present applications which he has no serious intention to prosecute. As pointed out in *Ramani Debi* v. *Kumud Bandhu Mookerjee* (5), the danger apprehended may

(1) [1892] A. C. 547, 564.
(2) (1890) 38 W. R. (Eng.) 746.
(3) (1889) 23 L. T. R. Ir. 54.
(4) (1899) I. L. R. 24 Mad. 1; L. R. 27 I. A. 197.
(5) (1910) 12 C. L. J. 185, 191.

1911

LANGAT SINGH v. JANKI KOER.

easily be avoided, if upon dismissal of a frivolous application for amendment for default, a suitable order for costs of a deterrent character is made in favour of the party sought to be harassed: or, again, as explained in *Grepe* v. *Loam* (1), the Court may in its discretion refuse to entertain an application for amendment presented after repeated frivolous applications of a similar character by the same party. In the case before us, however, no such consideration obviously arises. Ever since the decree was drawn up on the 14th December, 1901, the judgment-debtor has persistently endeavoured to get the decree amended. The decree-holder has with equal obstinacy resisted the applications on grounds of the most unsubstantial character, and the Courts successively called upon to deal with the matter have displayed a singular adherence to technicalities, regardless of the true merits of the case, which have not been by any means difficult to discover. The result has been that a decree erroneously drawn up on the 14th December, 1901, was not amended till the 16th March, 1911. It is a matter of regret, no less than surprise, that such delay should have been possible in a case of this description.

The learned counsel for the petitioner has contended upon the authority of the decision in *Hatton* v. *Harris* (2) and *Stewart* v. *Rhodes* (3) that it is inequitable that an amendment should be allowed at this distance of time to the prejudice of the assignee of the decree. We are not satisfied by any means that the principle invoked, namely, that a Court will not amend a decree to the prejudice of third persons who have acquired interests for value, has any application to cases of assignments of decrees, and if the question arose for

(1) (1887) 37 Ch. D. 168. (2) [1892] A. C. 547.
(3) [1900] 1 Ch. 386.

consideration, we should have to examine the validity of the contention of the opposite party that the doctrine does not apply, because an assignee of a decree takes subject to the equities between the assignor and the judgment-debtor: see *Monmohan Karmokar* v. *Dwarka Nath Karmokar* (1). The question suggested, however, was not propounded in the Court below, and we have no finding by the Subordinate Judge that the assignee took without notice of the claim for amendment. On the other hand, there is good reason for the suggestion that the assignee had notice. The first application for amendment was made as early as the 26th November, 1902; since then, the matter has been continuously before the Court in one form or another, and the application for amendment, which has now been granted, has been pending ever since the 22nd August, 1905. The assignment of the decree, we are informed, was made so late as the 16th October, 1908, although it is said that as early as 20th December, 1901, the assignee had acquired some interest (not explained) in the decree. But he was a party to the appeal in the High Court and must have been aware of the proceedings for amendment. It is perfectly sound doctrine that all persons who are not parties to the action, and who have acquired interests, based on the existing state of the record, acting in good faith and being purchasers for valuable consideration, without notice, actual or implied, of the existence of the matters, evidence of which has been supplied by the amendment, are not prejudiced thereby, unless they have been accorded a hearing and the Court has determined that they have no such equities as entitle them to be exonerated from the effect of the amendment. The case before us is, however, obviously

(1) (1910) 12 C. L. J. 312, 321.

1911

LANGAT SINGH v. JANKI KOER.

not of the description to which this salutary principle can have any application.

The result, therefore, is that this Rule must be discharged with costs.

S. C. G. *Rule discharged.*

FULL BENCH.

Before Sir Lawrence H. Jenkins, K.C.I.E., Chief Justice, Mr. Justice Woodroffe, Mr. Justice Mookerjee, Mr. Justice Carnduff and Mr. Justice D. Chatterjee.

1911

Sept. 5.

RAJ KUMARI DEBI

v.

BARKATULLA MANDAL.*

Under-raiyat—Patta for a period of indefinite duration—Ejectment—Notice —Bengal Tenancy Act (VIII of 1885), s. 49, cl. (b).

The case of an under-raiyat holding under a *patta* executed before the passing of the Bengal Tenancy Act and not expressly providing for the period of its duration, comes within cl. (*b*) of s. 49 of the Bengal Tenancy Act, and the notice must be as provided thereunder.

Madan Chandra Kapali v. *Jaki Karikar* (1) overruled.

REFERENCE to Full Bench.

The reference to Full Bench, by Chitty and N. R. Chatterjea JJ., so far as it is material for the purposes of this report, was in the following terms :—

"This second appeal arises out of a suit brought by the plaintiffs to eject the defendants from certain land. The facts are that the plaintiff is an occupancy raiyat of the said land. On 18th *Sraban* 1288 (1st August 1881), the predecessor of the defendants executed in favour of the plaintiff a *kabuliat* as *korfa* or under-raiyat. The *kabuliat* was for no fixed period

* Reference to Full Bench in Appeal from Appellate Decree No. 1499 of 1909.

(1) (1902) 6 C. W. N. 377.

or term. The defendants were holding the land under that *kabuliat* and were served by the plaintiff with a notice to quit, in accordance with the terms of section 49 (*b*) of the Bengal Tenancy Act. The Courts below following the case of *Madan Chandra Kapali* v. *Jaki Karikar* (1), have dismissed the plaintiffs' suit. The plaintiffs have appealed.

The Courts below have referred to the cases of *Komaruddi* v. *Sreenath Chowdhury* (2), *Mohendra Nath Sepai* v. *Parbutty Charan Dass* (3), and *Idugazi Doctor* v. *Chandra Kali Sundrani* (4). They distinguish them by saying that in those cases the *kabuliats* were after the passing of the Bengal Tenancy Act. As a matter of fact, in the first of the three cases, the date of the *kabuliat* or *patta* does not appear. In the second, the *kabuliat* was no doubt after the passing of the Act, *i.e.*, in 1893. But, in the third, the *patta* was dated 13th *Baisak* 1290 (26th April 1883). The actual date of the lease does not, in my opinion, make much difference. The question turns upon the construction to be put upon section 49 of the Bengal Tenancy Act. If the words "written lease" are to be given their ordinary meaning, then it is clear that in enacting section 49, the Legislature omitted to provide for a case where an under-raiyat holds under a written lease for an indefinite period. This was the view taken in the case of *Madan Chandra Kapali* v. *Jaki Karikar* (1), where the learned Judges said: "But if he holds under a written lease for an indefinite time, his raiyat lessor cannot eject him arbitrarily. He can only do so for non-payment of the rent." In the case of *Komaruddi* v. *Sreenath Chowdhury* (2), decided by the late Chief Justice and Mitra J., it was held that "written lease in sub-section (*b*) means such a written lease as is mentioned in sub-section (*a*), that is, a written lease defining the term of the tenancy." The case of *Madan Chandra Kapali* v. *Jaki Karikar* (1) was not referred to on that occasion. In the other two cases, in 8 Calcutta Weekly Notes, decided by Mitra J., very shortly after the first, that case was referred to, but the learned Judge adhered to the view which was taken by the late Chief Justice and himself. With all respect to those learned Judges, we would point out that it is only by implication from the preceding words that the words "written lease" in sub-section (*a*) can be taken to denote only a written lease for a definite term. To fix them with that meaning some other words must be read into the section, whether in sub-section (*a*) or (*b*). However, as the cases in 6 and 8 Calcutta Weekly Notes stand, that in the former volume is in direct conflict with those in the later volume. The question is one of considerable importance to raiyats and under-raiyats, and we would, therefore, refer it to the Full Bench. The question will be:—Whether in the case of a under-raiyat holding land from

(1) (1902) 6 C. W. N 377.
(2) (1903) 8 C. W. N. 136.
(3) (1903) 8 C. W. N. 136.
(4) (1903) 8 C. W. N. 139.

1911

RAJ KUMARI DEBI v. BARKATULLA MANDAL.

a raiyat under a written lease executed before the passing of the Bengal Tenancy Act, the lease not being expressed to be for any definite term, the under-raiyat is liable to ejectment, and, if so, after what notice. Certain other cases were cited which turn on the construction to be put upon section 85 of the Act. These have, in our opinion, no direct bearing upon the present question."

Babu Surendra Chandra Sen, for the appellant. I contend that the lease was terminable by notice. A "lease" is not defined in the Bengal Tenancy Act, but a "tenant" is. Strictly speaking, there cannot be a lease for an indefinite period.

I submit that the case is covered by cl. (*b*), if the words "for a term" are introduced after the words "written lease" in the clause. Those words are there by implication.

The tenants were really tenants-at-will. My first contention is that having regard to s. 85(*3*) of the Bengal Tenancy Act, if it is a lease, cl. (*b*) applies; and if it is not a lease, cl. (*a*) applies. Sections 49 and 85 should be read together.

Sections 10, 18, 25, 44 and 49 are sections under which tenants are liable to be ejected. There is also the s. 178 (1), cl. (*c*). All tenants except *mokarrari* ones are liable to be ejected. Therefore, if under-raiyats cannot be ejected by notice, he would enjoy higher rights than even occupancy raiyats or tenants at fixed rates. Before the passing of the Bengal Tenancy Act, the position of tenants was less secure. Now raiyats have the right to let out land for a certain period. *Madan Chandra Kapali* v. *Jaki Karikar* (1) is against me. But the case has not been followed.

The question of notice does not even appear in the judgments of the Courts below. Perhaps the only question in issue was, if the case came under cl. (*b*)

(1) (1902) 6 C. W. N. 377.

of s. 49, taking the duration of lease only into consideration.

I am prepared to concede that he was a tenant from year to year, and I was bound to give him reasonable notice before the end of the year. In this case, I was more than careful, lest the tenant raised the objection that, after the passing of the Bengal Tenancy Act, he could be ejected under the provisions of that Act only. I gave notice under cl. (*b*) of s. 49. "Under-raiyat" in clause (*b*) must mean *all sorts* of under-raiyats.

The cases of *Komaruddi* v. *Sreenath Chowdhry*(1) and *Idugazi* v. *Chandra Kali Sundrani*(2) are in my favour. So is *Mohendra Nath Sepai* v. *Parbutty Charan Dass* (3). The head-note of this case is wrong.

Babu Hari Charan Ganguli, for the respondent. The lower Courts and the referring Judges have taken it to be a written lease. The lease must be admitted. Such leases are quite common. "Lease" has been defined in the old Rent Act and covered all sorts of tenancy. The meaning of the word is now too well known to require a definition. That is the reason that the word has not been defined in the new Act. A lease need not be for a definite period. If the Legislature meant it to be otherwise, it could have framed the sections in definite terms : see s. 3 of the Registration Act.

I contend that a lease for an indefinite period enures to the benefit of the tenant. A sub-lease is binding on the raiyat, but not on the landlord. The Legislature did not intend to interfere with the contractual relationship between a raiyat and his under-raiyat.

(1) (1903) 8 C. W. N. 136. (2) (1903) 8 C. W. N. 139.
(3) (1903) 8 C. W. N. 136.

1911

RAJ KUMARI DEBI v. BARKATULLA MANDAL.

I do not quite mean to say that the lease was a permanent lease. I say that the raiyat is debarred from contending that the under-raiyat is liable to ejectment.

By dichotomy, unwritten leases would be excluded from the consideration of the Legislature.

Cur. adv. vult.

The judgment of the Court (JENKINS C. J., WOODROFFE, MOOKERJEE, CARNDUFF and D. CHATTERJEE JJ.) was as follows :—

The decision of the question referred in this case depends upon the proper construction of section 49 of the Bengal Tenancy Act. Chapter VII of the Act, which deals with the under-raiyats, consists of two sections. Section 48, speaking of the limit of rent recoverable from under-raiyats, divides rent into two classes: rent payable under a registered lease or agreement, and rent payable in any other case, thus comprising all classes of under-raiyats. Section 49, dealing with the ejectment of under-raiyats, divides them into two classes: clause (*a*) speaks of those who hold under a written lease, and clause (*b*) speaks of those who hold otherwise than under a written lease. The term "written lease" in clause (*a*) is necessarily restricted by the word "term" used before to written leases which are for a term or period of duration mentioned in the lease. The word "term" is not repeated in clause (*b*), and it is therefore contended on the authority of the case of *Madan Chandra Kapali* v. *Jaki Karik r* (1) that the case of an under-raiyat who holds under a *patta* which does not provide for any period of duration, is omitted from the purview of the section, and that he cannot therefore be ejected except

(1) (1902) 6 C. W. N. 377.

under section 66 for non-payment of rent. The Court is of opinion that there is no sufficient reason for holding that the Legislature made any such omission either by intention or by mistake. As regards intention, there is no reason why a tenant of this class should attract any particular favour from the Legislature. As regards mistake, it must be remembered that this class of *pattas* called *méla pattas* or *be-miadi pattas* are very common in Bengal and could not have escaped notice. Looking at the whole scheme of the Act and the manner in which the different classes of tenants are dealt with in its different provisions, the Court holds that the proper construction to be placed on the word "written lease" in clause (*b*) is to read them as indicating a written lease of the same kind as that mentioned in clause (*a*).

The answer to the Reference, therefore, is that the case of an under-raiyat holding under a *patta* executed before the passing of the Bengal Tenancy Act and not expressly providing for the period of its duration comes within clause (*b*) of section 49, and the notice must be provided thereunder.

In this view of the case, the appeal must be decreed with costs.

Appeal allowed.

S. M.

FULL BENCH.

Before Sir Lawrence H. Jenkins, K.C.I.E., Chief Justice, Mr. Justice Woodroffe, Mr. Justice Mookerjee, Mr. Justice Carnduff and Mr. Justice D. Chatterjee.

1911

Sept. 5.

LALIT MOHAN GHOSH

v.

GOPALI CHUCK COAL COMPANY, LD.*

Registration—Document—Variation of Terms—Registration Act (XVI of 1908), s. 17(d).

A document which varies the amount of rent to be paid under an existing lease registered as required by s. 17(*d*) of the Indian Registration Act, as also the incidents of such payments, namely, the date of payment nd consequences of default of payment, requires registration.

Durga Prasad Singh v. *Rajendra Narain Bagchi* (1) approved, so far as it determines that a document embodying an agreement for reduction of rent under a previously existing lease registered, as required by s. 17(*d*) of the Registration Act, requires registration.

REFERENCE to Full Bench.

The reference to Full Bench by Woodroffe and Caspersz, JJ. was in the following terms :—

"This suit is brought by the plaintiffs, Lalit Mohan Ghosh and others, as heirs of the late Nanda Lal Ghosh, to recover royalties in respect of Coal Mining lease held by the defendants. The original lease, dated 25th July, 1896, was by Nanda Lal Ghosh in favour of certain persons forming the Kurkend Coal Syndicate. This Syndicate assigned its rights under the lease to the New Kurkend Coal Syndicate, Limited, a Joint Stock Company, on the 13th November, 1899. The latter company attorned to the lessor and paid royalties to him in terms of the original lease. Subsequently, and on the 22nd December, 1903, the rates of royalty were by a registered deed of that date altered. The royalty payable as so altered was six annas per ton for steam coal, soft coke, hard coke and steam

* Reference to a Full Bench in Appeal from Original Decree, No. 45 of 1908.

(1) (1909) I. L. R. 37 Calc. 293.

rubble, three annas per ton for B. B. rubble and dust free instead of the sliding scale provided for in the original lease. This document confirmed the original lease in other respects including the terms under which royalty was payable quarterly, and, if not paid, interest was chargeable on all sums unpaid at the rate of 1 per cent. per month. The New Kurkend Coal Syndicate worked under this arrangement, but does not appear to have done well, the royalty for 1905 became overdue and the liquidation of the company became necessary. Then at the close of 1905 and the commencement of 1906 negotiations (which were subsequently embodied in letters) took place with a view to the payment of the overdue royalty and the reduction of the rates of future royalties on coal. On the 18th January, 1906, Messrs. McLeod & Co., Managing Agents of the Colliery, wrote to the proprietors as follows :—

NEW KURKEND COAL SYNDICATE, LIMITED,
The 18th January 1906.

To

BABU NANDA LAL GHOSH.

DEAR SIR,

We confirm our conversation of date to the following effect. That you reduce the royalty to be charged on coal raised at this property to the undermentioned rates :—

Steam coal	...	...	4½ annas
Rubble ...	...	...	4½ do.
Dust ...	...	...	2 do.

as a permanent arrangement to hold good from the 1st January, 1906. As regards the royalty due for the year 1905, we have to thank you for agreeing to allow this to remain over until it is convenient to make payment which we will make as soon as possible. As explained to you, it may be necessary to put the existing company into liquidation and to make over the property to another company, but in terms of our lease from you, you will duly be advised of any arrangement that may be contemplated. We beg to thank you for patiently listening to the declaration of the company's position and our views as (torn) for your considerate treatment as evidenced by the reduction in royalty you have made and the accommodation as regards back roalty due.

We are,
Dear Sirs,
Yours faithfully,
McLEOD & Co.,
Managing Agents.

1911

LALIT MOHAN GHOSH v. GOPALI CHUCK COAL COMPANY, LD.

This was followed by a letter from the proprietor, dated the 20th January, 1906, on which is based the main argument in this appeal.

9, COLLEGE SQUARE,
Calcutta, the 20th January 1906.

To

MESSRS. MCLEOD & CO.,
Managing Agents, New Kurkend Coal Syndicate, Ld.

DEAR SIRS,

I am in receipt of your letter, dated the 18th instant. Since my interview with your Mr. N. A. McLeod, I have consulted my lawyers about my position regarding the royalty due for the year 1905, in case it may be necessary for you to put the existing company into liquidation and make over the property to another company, and I have been advised that it would not be at all safe for me to allow this sum to remain over until it is convenient for you to make payments.

So I beg to inform you that I shall be glad to help you in your present difficult situation by reducing and altering the royalty to be charged on coal raised at this property to the undermentioned rates :—

Steam coal	...	...	4½ annas.
Rubble ...	...	...	4½ do.
Dust ...	...	...	2 do.

Hard and soft coke, as in the deed, as a permanent arrangement, not to hold good from the 1st January, 1906, as you say, but from the date on which you will pay me the royalty due for the year 1905, and on condition of your paying me the royalty hereafter monthly.

If you, however, fail to make payment of the royalty consecutively for three months, this letter will be cancelled, and I shall be entitled to the rates of royalty as stipulated in our deed.

Yours faithfully,
NANDA LAL GHOSH.

The effect of this letter is as follows :—

The royalty for steam coal is reduced from 6 annas to 4½ annas. The rates for soft coke and hard coke remain the same. The rate for steam rubble is reduced from 6 to 4½ annas. The rate for B. B. rubble is enhanced from 3 to 4½ annas per ton, and on dust which was originally free is imposed a new charge of 2 annas per ton. The above changes affect the rate only, and the result of such changes in fact has been according to past working to reduce the total royalty payable. The second alteration which this agreement effects is as to date of payment of royalty which is to be paid monthly and not quarterly as heretofore.

As a necessary effect of such alteration a third is effected. The original term as to the payment of interest on royalty in arrear after the quarterly date disappears as the royalty is to be paid monthly. In lieu however of this a new and fourth term is embodied, *viz.*, that if there is a failure to pay royalty for three consecutive months the agreement is cancelled and royalty becomes payable according to the terms of the existing lease. It has been contended for the respondent that the condition that the agreement has to come into effect not from the 1st January, 1906, but from the date on which the royalty for the year 1905 was paid, was waived. In our opinion this is not so. That royalty was fixed by a letter of the 27th January, 1906, at Rs. 10,000. Of this, Rs. 8,000 was paid on the 31st January. The fact that Nanda Lal Ghosh gave on the 3rd February time to pay up the balance does not affect the matter. This waived his demand for immediate payment only. But the agreement for reduced royalty, if enforceable, would not come into operation until the payment was made, which was on the 28th June, 1906. On this point we agree with the lower Court. On the 20th February, 1906, Nanda Lal Ghosh died. In March and April his heirs (it is said in ignorance of the facts) received royalty at the reduced rates mentioned in the letter of their father of the 20th January, 1906, to which we refer as the agreement. They were then informed that negotiations were taking place for the transfer of the lease to the defendant company. On the 20th June, 1906, the New Kurkend Coal Syndicate, which was then in voluntary liquidation, and its liquidator assigned the colliery lease to the defendant company. That deed which was registered recites that the original lease of the 25th July, 1896, had been ultimately modified by the document of the 22nd December, 1903, and the covenant by the defendant company in favour of the assignor was to pay the rent or royalty mentioned in such last mentioned document. By inadvertence, however, the company's solicitors overlooked the fact that the document of the 22nd December, 1903, had itself been modified by the agreement of the 20th January, 1906. In June the company offered payment of royalty for the months of March, April and May at the reduced rate provided for in the agreement, and this offer was repeated as regards subsequently accruing royalties. The plaintiff refused, however, to accept them, and claimed payment according to the terms of the document of the 22nd December, 1903. On the 24th August, 1906, the New Kurkend Coal Syndicate and its liquidator attempted to repair the omission to which we have referred, and by a registered document, dated 24th August, 1906, reciting the agreement of the 20th January, 1906, and the fact that it had been inadvertently omitted from the assignment of the 20th June, 1906, assigned to the defendants the full benefit of such agreement (which was set out in the schedule) to the intent and purpose that the assignment

1911

LALIT MOHAN GHOSH v. GOPALI CHUCK COAL COMPANY, LD.

effected by the principal indenture might, with effect from the date when the agreement came into operation, be read and construed as if and in and by the same indenture the properties, rights and premises comprised in the lease of the 25th July, 1896, had been expressly assigned with the full benefit of and subject to as well the said agreement as the agreement of the 22nd December, 1903, with full power and authority for the company to specifically enforce the said agreement.

It has been suggested that this transfer was ineffectual, because at its date the company had been wound up and the liquidator discharged. No such issue was raised in the lower Court. No order of discharge has been produced. Under section 187 of the Companies Act the Syndicate would not have been dissolved until three months after the sending in of the accounts. Mr. McLeod seems in his evidence to have wrongly assumed that he was discharged when he sent in his account. We hold that this contention fails.

As we have said, the plaintiffs refused the defendants' money. We are satisfied that under the circumstances there was a sufficient tender by the defendants.

The plaintiffs worked for some time apparently under the idea that the defendant company would sue for specific performance. But as the company were apparently advised that this was not necessary and did not sue, the plaintiffs instituted this suit claiming the recovery of Rs. 7,863-4-15 as royalty on the basis of the rates contained in the document of the 22nd December, 1903. The defendant company set up the subsequent agreement of the 20th January 1906, and claiming that reduced rates are chargeable under that agreement, have paid into Court the sum of Rs. 6,657-6-6. The Lower Court has accepted this view of the case subject to the modification that it has considered and as we think rightly, that if reduced rates are payable they are so payable only from the date when the back royalty for 1905 was paid.

The appellant has raised a number of objections which we deal with before treating of the substantial question which we desire to refer to the Full Bench. In our opinion, if other consideration than that involved in the substitution of agreements is necessary, the letter of the 20th January, 1906, on its face shows consideration, as for instance, in the substitution of monthly for the previous quarterly payments. The agreement was not as contended a mere personal agreement with the new Kurkend Syndicate, of which it was not intended that the defendant company should have the advantage. The correspondence shows that the royalty was reduced with the object of inducing some other substantial company to work the colliery. Nor in our opinion does any question arise as to the parties not being *ad idem* over the matter. There was no

question as to the meaning of the terms of the letter of the 20th January, 1906. The difference which has arisen between the parties, and which as stated has been decided against the defendants, was due to the latter's contention that the term as to the date when the reduced royalties were to come into operation had been subsequently modified by later correspondence. We hold with the lower Court that that is a mistaken view of the effect of such correspondence. It is then said that the assignment of the 22nd June, 1906, was inoperative, because it was an assignment of a mere right to sue. But such a right must be distinguished from a right (which as here) arises out of an interest. What was here assigned was the benefit of an agreement in connection with and arising out of the lease held by the defendant company. It has been nextly said that the agreement is inoperative, because there has been default in payment of royalty for three consecutive months. If the plaintiffs have rightly refused to take the money offered by the defendants the question does not arise, *but if* they have wrongfully refused (and they have been offered the money) they cannot set up such wrongful refusal to bring the clause of forfeiture into operation.

The substantial question in this case is whether the agreement of the 20th January, 1906, required registration or not. If it did, the defendant company took nothing by the subsequent assignment of its benefit to them.

If that agreement constitutes a lease as the appellants contend, then under section 17, clause (*d*) of the Registration Act, it should have been registered. And on this ground documents containing the essential elements of a lease such as the area of the land, the nature of the interest conveyed, the duration of the tenancy and the rental have been held to be leases, and as such requiring registration : see *Biraj Mohinee Dasee* v. *Kedar Nath Karmakar* (1) and *Durga Prasad Singh* v. *Rajendra Narain Bagchi* (2). In our opinion, however, the document is not a lease but an agreement which modifies the conditions of a lease in three particulars, viz., the amount of rent or royalty, the period at which rent or royalty is payable and the result of default of payment of rent or royalty. The variations thus touch the question of rent or royalty only. But then it is further contended for the appellants that assuming that it is not a lease and that it can be treated merely as an agreement for reduction and payment of rent, it is in effect an agreement purporting to limit and create an interest in immovable property under clause (*b*) of section 17 and requires registration. For the respondent company it is contended firstly that clause (*b*) of section 17 does

(1) (1908) I. L. R. 35 Calc. 1010. (2) (1909) I. L. R. 37 Calc. 293.

1911

LALIT MOHAN GHOSH v. GOPALI CHUCK COAL COMPANY, LD.

not affect lease or (apparently) matters touching leases which are governed by clause (*d*), and secondly that if that be not so the letter does not affect an interest in immoveable propertly and fall within clause (*b*). Rent or royalty though derived from land are, it is argued, not interest in immovable property within the meaning of clause (*b*). Reliance is placed on *Satyesh Chunder Sircar* v. *Dhunpul Singh* (1) where it was held that an agreement which did not operate as lease but was merely a variation by way of abatement of rent did not require registration. In *Obai Goundan* v. *Ramalinga Ayyar* (2), it was held following the last case that a document given by the owners of land to his tenant varying the terms of tenancy with reference to the amount of rent to be paid, is not an instrument relating to an interest in immoveable property and does not require registration. The principle of these cases was approved and applied in *Hara Prasad Das* v. *Ram Narain Chowdhury* (3). The Bombay case cited (Shrinivasbhat *versus* Waman in Narsingh, P. J. 1893) seems to have been to a similar effect, though the decision was otherwise justifiable on the ground that the agreement related to a matter of a value less than Rs. 100.

Learned counsel for the appellants has contended that the decisions of this Court referred to were *obiter dicta*. It may be a question whether if that be so the same observation does not apply to the case on which he has relied : *Durga Prasad Singh* v. *Rajendra Narain Bagchi* (4). In that case it was held that the document in fact constituted a lease which we hold not to be the case here, and it was further held that there was no consideration. The learned Judges, however, went on to say that even if the document in question could be treated merely as an agreement for reduction of the rent, it was in effect an agreement purporting to limit an interest in immoveable property and thus required registration. The learned Judges base their decision on certain English cases dealing with the Statute of Frauds and on inferences derived from the Privy Council decision in *Subramanian Chettiar* v. *Arunachalam Chettiar* (5). They distinguished the cases of *Satyesh Chunder Sircar* v. *Dhunpul Singh* (1), and *Beni Madhub Gorani* v. *Lal Moti Dassi* (6), holding as regards the first mentioned case that were it not that the agreement had been admitted in the plaint, the Court would have held that the document required registration. But this does not appear to us to be so, for what the Court stated was that had there been no admission, the question ofregistration would "arise" and be "important." It,

(1) (1896) I. L. R. 24 Calc. 20.
(2) (1898) I. L. R. 22 Mad 217.
(3) (1909) 11 C. L. J. 22, 25.
(4) (1908) I. L. R. 37 Calc. 293.
(5) (1902) I. L. R. 25 Mad. 603 ; L. R. 29 I. A. 138.
(6) (1898) 6 C. W. N. 242.

however, then held that it was not necessary that the agreement in question should be registered.

In this conflict of authority we refer to the Full Bench the determination of the following questions :—

(i) Has the case of *Durga Prasad Singh* v. *Rajendra Narain Bagchi*(1) been correctly decided in so far as it determines that a document, though not amounting to a lease, requires registration, if it be an agreement for reduction of rent under a previously existing registered lease ?

(ii) Does a document which is not a lease but which varies the amount of rent to be paid under an existing registered lease as also the incidents of such payments, *viz.*, the date of payment and consequences of default of payment, require registration ? "

Dr. Rashbehary Ghose (with him *Babu Jogesh Chandra De*, *Babu Mahendranath Roy*, *Babu Narendranath Set* and *Babu Srish Chandra Dey*), for the appellants. Under s. 107 of the Transfer of Property Act, defendant cannot rely on an unregistered document. The 'lessee' cannot moreover be heard to say that all the terms of the lease were not in the registered document. I am not going to contend that the document is a lease. He is precluded from saying that there was a fresh demise. If that could be done, the whole policy of the Transfer of Property Act would be defeated: *Sanderson* v. *Graves* (2) and *Subramanian Chettiar* v. *Arunachalam Chettiar* (3): see the arguments of Cohen in the latter case reported in 12 Mad. L. J. 479. It is only the Transfer of Property Act which deals with transactions, as the Registration Act with deeds. The Transfer of Property Act makes all this compulsory, but the Registration Act does not make it compulsorily so. There are decisions in support of the respondent's contention, but there is no such a current of decisions as to make it binding on your Lordships. So very early as 1873, in *Byinath*

(1) (1909) I. L. R. 37 Calc. 293.
(2) (1875) L. R. 10 Ex. 234.
(3) (1902) I. L. R. 25 Mad. 603; L. R. 29 I. A. 138.

1911

LALIT MOHAN GHOSH v. GOPALI CHUCK COAL COMPANY, LD.

Dutt Jha v. *Mussamat Putsohee Dobain* (1), it was held that a lease, altering the terms of the previous lease, requires to be stamped. I am entitled further to contend that the lessee is precluded from ascertaining the terms of a lease partly from a registered deed and partly from an unregistered one: *Venkaji Babaji Naik* v. *Shidramapa Balapa Desai* (2); *Mangalsawami* v. *Subbia Pillai* (3); Dart on Vendors and Purchasers (6th Ed., 1888), pp. 219-220, 236; *Donellan* v. *Read* (4).

I am assuming that royalty is rent. Rent is a first charge. The effect of the second deed is to release the first charge. As such, it should have been registered.

The next point is that this 'lease' (a mining lease) is a sale of an interest in land. The document should, therefore, have been registered: *Gowan* v. *Christie* (5) and *Munro* v. *Didcott* (6): see also Registration Act, ss. 3 and 17(*b*). Sir H. Maine rightly contended that some decisions have defeated the beneficient objects of the Registration Act.

Now, I propose to discuss the cases apparently relied on by the other side:

Satyesh Chunder Sircar v. *Dhunpul Singh* (7). The existence of an agreement to reduce the rent was admitted by the lessors in the pleadings. Now, where there is the pleading, it serves the place of a written agreement: see also Evidence Act, s. 65. The cases relied on by Ghose J. were not cases under the Transfer of Property Act and distinguishable: *Maharaja Luchmissur Singh* v. *Mussamat*

(1) (1873) I. L. R. 20 W. R. 36.
(2) (1894) I. L. R. 19 Bom. 663.
(3) (1910) I. L. R. 34 Mad. 64.
(4) (1832) 3 B. & Ad. 899, 904.
(5) (1873) L. R. 2 Sc. App. 273, 283.
(6) [1911] A. C. 140, 148.
(7) (1896) I. L. R. 24 Calc. 20.

Dakho (1), *Buriorji Cursetji Panthaki* v. *Muncherji Kuverji* (2).

In *Chedambaram Chetty* v. *Karunalyavalangapuly Taver* (3), there was an admission and has nothing to do with registration.

In *Obai Goundan* v. *Ramalinga Ayyar* (4), the document in question was held only to "evidence an agreement to vary the terms." The case of *Hara Prasad Das* v. *Ram Narain Chowdhury* (5) is similar to the one just before cited, and is also distinguishable.

The last case relied on by the other side is *Beni Madhub Gorani* v. *Lalmoti Dassi* (6). That case has been repeatedly distinguished: see *Durga Prasad Singh* v. *Rajendra Narain Bagchi* (7) and *Lakhatulla* v. *Bishwambhar Roy* (8), *vide* the judgment of Richardson J. The judgment of Richardson J. was affirmed by Jenkins C.J. and Doss J. and followed by Mookerjee J. in *Sarat Chandra Sinha* v. *Nrityа Gopal Biswas* (9).

The answer to both these questions referred to the Full Bench should be in the affirmative.

Mr. Bagram (with him *Babu Manmatha Nath Mukherji*), for respondents. The whole controversy depends on what the word 'rent' means. 'Rent' is really the outcome of a relationship of landlord and tenant. A 'lease' includes many things. You cannot have a separate lease for right to light, a right to receive rent, etc., etc. 'Rent' is a sum of money or service that may be rendered. Freedom of contract is not controlled by any Act. In this case there was

(1) (1881) I. L. R. 7 Calc. 708.
(2) (1880) I. L. R. 5 Bom. 143.
(3) (1867) 3 Mad. H. C. 342.
(4) (1898) I. L. R. 22 Mad. 217.
(5) (1909) 11 C. L. J. 22.
(6) (1898) 6 C. W. N. 242.
(7) (1909) I. L. R. 37 Calc. 293, 303.
(8) (1910) 12 C. L. J. 646.
(9) (1910) 13 C. L. J. 284.

1911

LALIT MOHAN GHOSH v. GOPALI CHUCK COAL COMPANY, LD.

only a contract to vary terms. The Registration Act has nothing to do with contracts. In *Subramanian Chettiar* v. *Arun chalam Chettiar* (1) the question was the construction of the lease, and the discussion was mainly as regards the applicability of section 92 of the Evidence Act.

It is not proper to refer to arguments of counsel and remarks of Judges in the course of argument as authorities. I admit that a lease should contain all the terms material to the same, but what is there to prevent parties from varying the obligations arising under the existing lease. A lease is in its essence a transfer of interest in land, whatever the exact terms be. The mode of enjoyment and the duration of lease are the most important elements: see Registration Act, section 17, clause (*d*). Does a lease for two months at a very high rent require registration?

Speaking of 'rent' as interest in land, it must be a qualified interest. If a rent charge is created, it is not the proper subject-matter of assignment: *Southwell* v. *Scotter* (2).

Liability to registration does not depend on the amount. It turns on the duration of time. The area may be anything. Otherwise all leases have to be registered under clause (*b*) of section 17. It would be anomalous, if registration is compulsory in all cases. Section 92 of the Evidence Act would be useless.

The consideration of a lease comes under section 17 (*c*) of the Registration Act. So amount of rent is not a very material element so far as the question of registration goes. It is not therefore correct to say that a lease to be operative must have the amount of rent registered. The money consideration need not be in the lease even.

(1) (1902) I. L. R. 25 Mad. 603. (2) (1880) 49 L. J. R. (Q. B.) 356.

The Transfer of Property Act does not regard 'rent' as property: *Burjorji Cursetji Panthaki* v. *Muncherji Kuverji* (1).

Take the case of commutation of rent. Is it also compulsorily registrable?

The current of authorities is in my favour and not distinguishable. Cases cited against me are inapplicable or not against me.

Satyesh Chunder Sircar v. *Dhunpul Singh* (2) cannot be got over simply by saying that there was an admission.

Freedom of contract should always exist.

Hara Prasad Das v. *Ram Narain Chowdhury* (3) is not distinguishable and is a very sound judgment.

The judgment of Doss J. is based on a misapplication of authorities cited to the Judges and on the wrong analogy of Statute of Frauds with the Transfer of Property Act.

The position taken up by Dr. Ghose that it is sale, is inconsistent with his own case. Foa, Woodfall and all other text-book writers are agreed that 'mining leases' are leases and not sales. All the incidents of a mining lease, viz., forfeiture, re-entry, etc., are against the notion of a sale. The mode of enjoyment may be like a sale, but the relationship of lessor and lessee continues, and in the eye of law it must be held to be a 'lease.'

Rent is not a charge under the Transfer of Property Act. It may be so under the Bengal Tenancy Act, but we have nothing to do with the latter Act. You may have rent-free land. Moreover, the parties have throughout treated the deed as lease.

(1) (1880) I. L. R. 5 Bom. 143. (2) (1896) I. L. R. 24 Calc. 20.
(3) (1909) 11 C. L. J. 22.

1911

LALIT MOHAN GHOSH v. GOPALI CHUCK COAL COMPANY, LD.

The 8th paragraph of the lease refers to erections made by us. Of course we would be entitled to do what we like with these.

Dr. Rash Behary Ghose, in reply. The Company was rightly advised to take action for specific performance. Section 105 of the Transfer of Property Act is a complete answer to the contention of Mr. Bagram that rent is not an essential term of lease. That is what Sir Ford North also said to Cohen in the Privy Council case (1). My learned friend said if the term of years or parcels are not changed, no registration for change of rent is necessary. The whole policy of the Legislature is the other way. He says that the assignee can easily ask the assignor for changes. That is not the policy of law. There is a current of cases in India which lays down that rent is an interest in land. I do not, however, see why Irish or English cases would not apply. A document embodying change of rent affects the 'burden' on the estate.

A registered document, embodying the alteration of terms, was, moreover, in the contemplation of the parties.

Cur. adv. vult.

The judgment of the Full Bench (JENKINS C.J., WOODROFFE, MOOKERJEE, CARNDUFF and D. CHATTERJEE, JJ.) was as follows:—

The questions referred for decision to the Full Bench have been framed as follows:—

(i) Has the case of *Durga Prasad Singh* v. *Raiendra Narain Baychi* (2) been correctly decided in so far as it determines that a document, though not amounting to a lease, requires registration if it be an agreement for reduction of rent under a previously existing registered lease?

(1) (1902) I. L. R. 25 Mad. 603. (2) (1909) I. L. R. 37 Calc. 293.

(ii) Does a document which is not a lease, but which varies the amount of rent to be paid under an existing registered lease as also the incidents of such payments, namely, the date of payment and consequences of default of payment, require registration?

It is necessary to premise at the outset that the original lease in the case before the Court, dated the 25th July, 1896, and varied by a registered deed, dated the 22nd December, 1903, was compulsorily registrable under section 107 of the Transfer of Property Act and section 17 (*d*) of the Indian Registration Act. The answers to the questions propounded consequently depend upon the constructions of these two sections. Section 107 of the Transfer of Property Act provides that a lease of immovable property from year to year or for any term exceeding one year, or reserving a yearly rent, can be made only by a registered instrument. The plain intent of the section is that all the essential incidents of a lease of this description must be embodied in one or more document duly registered. It is not necessary to attempt, on the present occasion, an exhaustive enumeration of all the essential incidents of such a lease: it is sufficient to hold that provisions about the amount of rent, the time of payment thereof, and the consequences of default, relate to the essential elements of the lease. This view receives support from the terms of section 105 of the Transfer of Property Act, and is involved in the decision of the Judicial Committee in *Subramanian Chettiar* v. *Arunachalam Chettiar* (1). The answers of the Full Bench to the questions referred are, therefore, as follows:—

(i) The case of *Durga Prasad Singh* v. *Rajendra Narain Bagchi* (2) has been, for the reasons given

(1) (1902) I. L. R. 25 Mad. 603; L. R. 29 I. A. 138.

(2) (1909) I. L. R. 37 Calc. 293.

1911

LALIT MOHAN GHOSH v. GOPALI CHUCK COAL COMPANY, LD.

here, correctly decided, in so far as it determines that a document embodying an agreement for reduction of rent under a previously existing lease registered as required by section 17(*d*) of the Indian Registration Act, requires registration.

(ii) A document, which varies the amount of rent to be paid under an existing lease registered as required by section 17(*d*) of the Indian Registration Act, as also the incidents of such payments, namely, the date of payment and consequences of default of payment, requires registration.

The case will be returned to the Division Bench with this expression of opinion. The costs of the hearing before the Full Bench will abide the result of the appeal.

S. M.

FULL BENCH.

Before Sir Lawrence H. Jenkins, K.C.I.E., Chief Justice, Mr. Justice Woodroffe, Mr. Justice Mookerjee, Mr. Justice Carnduff and Mr. Justice D. Chatterjee.

1911

Sept. 5.

KARTICK CHANDRA GHOSE

v.

ASHUTOSH DHARA.*

Execution of decree—Decree for money against judgment-debtor personally—Judgment-debtor in possession as shebait—Civil Procedure Code (XIV of 1882), ss. 244, 278.

If A, in execution of a decree for money against B personally, attaches and proceeds to sell properties of which B alleges that he is in possession not in his own right, but as *shebait* of a deity to whom the properties have been dedicated, the question does not fall within the scope of section

* Reference to Full Bench in Appeal from order No. 44 of 1908.

244 of the Civil Procedure Code, but within the scope of section 278 read with section 280 of the Code.

Kuriyali v. *Mayan* (1) not followed.

Punchanun Bandopadhya v. *Rabia Bibi* (2) distinguished.

REFERENCE to Full Bench on the appeal by the judgment-debtors, Kartick Chandra Ghose and others.

The refence by MOOKERJEE and VINCENT JJ., was in the following terms :—

"On the 20th May 1907, one Ashutosh Dhara, respondent in this appeal, obtained, in the Court of the Subordinate Judge of Hooghly, a decree for money against Kartick Chandra Ghose and his two brothers, now appellant before this Court. On the 4th June 1907, Ashutosh applied for execution of his decree. As certain properties had been attached before judgment, the Court directed the issue of sale proclamation and fixed the 13th August for sale. On the 7th August, the judgment-debtors presented a petition of objection under section 244 of the Civil Procedure Code of 1882, in which they urged that the properties attached and intended to be sold were in their possession, not on their own account or as their own properties, but in trust for four idols in whose favour they had been dedicated by their ancestors under a deed of endowment executed on the 31st January, 1883. The Subordinate Judge held that the question raised fell within the scope of section 278 and not section 244, and, under the proviso to the former section, declined to make the investigation on the ground that the claim had been designedly and unnecessarily delayed. The sale then took place in due course on the 13th August, and the properties were purchased by the decree-holder. The judgment-debtors then appealed to the District Judge on the ground that the objection preferred by them fell within the scope of section 244, and that it should not have been summarily rejected without investigation. The District Judge, however, held that the judgment-debtors were the representatives, not of a party to the suit but of a deity who was not a party to the litigation. In this view, he held that the claim must be taken to have been preferred under section 278, and so affirmed the order of the Court of First Instance. The present appeal is directed against the order of the District Judge. On behalf of the appellants, reliance has been placed upon the cases of *Beg Raj Marwari* v. *Debyi Kundah* (3) and *Jogendra Nath Sirkar* v. *Gobinda Chandra Dutta* (4), in support of the view that the objection raised falls within the scope of section 244, and reference

(1) (1883) I. L. R. 7 Mad. 255.
(2) (1890) I. L. R. 17 Calc. 711.
(3) (1902) 8 C. W. N. 353.
(4) (1908) 12 C. W. N. 310.

1911

KARTICK CHANDRA GHOSE v. ASHUTOSH DHARA.

has also been made to some observations in the case of *Punchanun Bundopadhya* v. *Rabia Bibi* (1). On behalf of the respondent, reliance has been placed upon the cases of *Roop Lall Dass* v. *Bekam Meah* (2), *Bhajahari Pal* v. *Ram Lal Dass* (3), *Ram Krishna Mahapatra* v. *Mohunt Padma Charan Deb Goswami* (4) and *Amar Chand Kundu* v *Nani Gopal Mukerjee* (5), in support of the view that the question raised is covered by section 278, and our attention has also been drawn to the case of *Ramanathan* v. *Levvai Marakayar* (6), where a similar view was taken by a Full Bench of the Madras High Court. There is a clear conflict of judicial opinion upon this subject, and under the Rules of Court we are bound to refer the matter for decision to a Full Bench. The question which we refer for decision may be formulated as follows :—

If A in execution of a decree for money against B personally attaches and proceeds to sell property, of which B alleges that he is possession, not in his own right but as *shebait* of a deity to whom the properties have been dedicated, does the question raised fall within the scope of section 244 or 278 of the Code of 1882 ?

As the question arises in an appeal from an Appellate Order, the whole case must be referred for final decision by the Full Bench."

Hara Kumar Mitter (with him *Babu Satyendra Nath Mukherji*), for the appellants. My contention is that this case comes under s. 244. As there is a conflict of rulings, the statute has to be construed. Section 244 is clear. Section 278 has to be construed. The Legislature contemplates the party to be a *person* and not *persona*. Section 278 should be read with the following sections up to s. 283. All that the Court has to do is to investigate who is in possession. The judgment-debtor can maintain a separate suit. The question as to the liability to attachment is a mixed question of law and fact. Possession is not the only element. The Legislature never meant to say that the executing Court should decide as to who is the party agreed.

(1) (1890) I. L. R. 17 Calc. 711.
(2) (1888) I. L. R. 15 Calc. 437.
(3) (1901) 6 C. W. N. 63.
(4) (1902) 6 C. W. N. 663.
(5) (1907) 12 C. W. N. 308.
(6) (1899) I. L. R. 23 Mad. 195.

If a person has two capacities, there is no reason why his objection should be to limited to one. The objection was raised as judgment-debtor. The question is not whether the objection is by the *shebait*. It does not come under s. 278. If the Legislature intended that the rights of parties could be investigated under s. 278, a decision under that section should have been given the force of a decree. Here the judgment-debtor says he is not the owner, but is in possession only. Under section 280, adjudication as to the liability to attachment is not possible.

Section 332 is for cases where the claimant has already been dispossessed.

It is against the policy of law to allow third persons to intervene: *Nga Tha Yah* v. *Burn* (1).

Kuriyali v. *Mayan* (2) is on the principle enunciated there exactly in point and approved of by the Privy Council, but doubted by the Madras Full Bench. The Privy Council case of *Prosunno Kumar Sanyal* v. *Kali Das Sanyal* (3) referred to.

[MOOKERJEE J. The question raised in the Madras case did not arise before the Privy Council in *Prosunno Kumar Sanyal's case* (3), and therefore that case is not binding on us.]

The question in *Punchanun Bundopadhya* v. *Rabia Bibi* (4) is similar and in my favour.

Any question beyond execution may be the basis of a suit, and a suit may lie.

In an executing Court the only question to be decided, is whether the attached property belongs to the judgment-debtor or not. The judgment-debtor is debarred from questioning this is another suit.

(1) (1868) 11 W. R. F. B. 8; 2 B. L. R. F. B. 91, 96.
(2) (1883) I. L. R. 7 Mad. 255.
(3) (1892) I. L. R. 19 Calc. 683; L. R. 19 I. A. 166.
(4) (1890) I. L. R. 17 Calc. 711.

1911

KARTICK CHANDRA GHOSE v. ASHUTOSH DHARA.

The fact is, the judgment-debtor objects as judgment-debtor, and says that the thing belongs to another.

Babu Baidya Nath Dutt and *Babu Tarini Das Banerjee*, for the respondent, were not called upon.

Cur. adv. vult.

The judgment of the Court (JENKINS C.J., WOODROFFE, MOOKERJEE, CARNDUFF and D. CHATTERJEE JJ.) was as follows :—

The question referred for decision to the Full Bench has been formulated in the following terms :—

If A, in execution of a decree for money against B personally, attaches and proceeds to sell properties of which B alleges that he is in possession, not in his own right, but as *shebait* of a deity to whom the properties have been dedicated, does the question raised fall within the scope of section 244 or 278 of the Civil Procedure Code of 1882?

In order that a question may be determined under section 244, it must arise between the parties to the suit in which the decree was passed. The question sought to be raised is not of this description, because while B is a party to the suit in his personal capacity, the claim is advanced by him in his capacity of *shebait* of a deity who is not a party to the suit.

In the opinion of the Full Bench, therefore, the question raised does not fall within the scope of section 244. On the other hand, it falls within the scope of section 278 read with section 280.

It has been argued, however, that this view is contrary to two decisions which are binding upon the Full Bench, namely, *Kuriyali* v. *Mayan* (1) and *Punchanun Bundopadhya* v. *Rabia Bibi* (2). The

(1) (1883) I. L. R. 7 Mad. 255. (2) (1890) I. L. R. 17 Calc. 711.

first decision no doubt involves by implication the view that the question raised falls within the scope of section 244, but it is not binding upon this Court; it was approved by the Judicial Committee in *Prosunno Kumar Sanyal* v. *Kali Das Sanyal* (1), upon an entirely different point, namely, that section 244 does not cease to be applicable to proceedings in execution merely because the execution purchaser is a stranger to the suit. The decision in *Punchanun Bundopàdhya* v. *Rabia Bibi* (2) is by a Full Bench of this Court, and is binding till overruled by a Special Bench. It does not, however, decide the question now in controversy, but merely deals with the converse question.

The result is that the appeal to the District Judge as also the appeal to this Court must be deemed incompetent. The appeal is, therefore, dismissed with costs of the hearing before the Division Bench and the Full Bench.

S. M. *Appeal dismissed.*

(1) (1892) I. L. R. 19 Calc. 683; L. R. 19 I. A. 166.

(2) (1890) I. L. R. 17 Cal. 711.

APPELLATE CIVIL.

Before Mr. Justice D. Chatterjee and Mr. Justice Teunon.

1911

Sept. 5.

RAGHUNANDAN RAMANUJA DAS

v.

BIBHUTI BHUSHAN MUKERJEE.*

Religious Endowment—Religious Endowments Act (XX of 1863), ss. 7, 8 and 10—Suit brought by surviving member of a Committee, whether maintainable.

A suit brought by a surviving member or members of a Committee appointed under s. 7 of the Religious Endowments Act (XX of 1863), is maintainable.

Santhalva v. *Manjanna Shetty* (1) dissented from.

SECOND APPEAL by the defendant, Mohunt Raghunandan Ramanuja Das.

The plaintiff, as the sole surviving member of a Committee appointed under section 7 of the Religious Endowments Act, brought a suit against the defendant for recovery of arrears of rent alleged to be due for the years 1311 to 1314 for 8·816 acres of land in mouzah Banlabandha. The defendant denied liability to pay rent, and further pleaded that the plaintiff had no *locus standi* to bring the suit. It appeared that at the time of the institution of the suit two out of three members were dead, and the vacancy caused by the death was not filled up in accordance with section 10 of the Act. Subsequently two other members were appointed, and

* Appeal from Appellate Decree, No. 1847 of 1909, against the decree of L. C. Adami, District Judge of Cuttack, dated May 28, 1909, affirming the decree of Hari Das Roy, Deputy Collector of Khurdah, dated Aug. 17, 1907.

(1) (1910) I. L. R. 34 Mad. 1.

an application was made, after the case was closed, to the Deputy Collector of Kurdah, before whom the rent suit was pending, to add the names of these members as plaintiffs. This application was rejected, but permission was given to the applicants to withdraw the suit with liberty to bring a fresh suit. The plaintiff having preferred to go on with the suit, the learned Deputy Collector, having held that the suit was maintainable, passed a decree in favour of the plaintiff. Against this decision the defendant appealed to the District Judge of Cuttack. The question as to whether the suit was maintainable or not, was not pressed before the learned District Judge, who dismissed the appeal. The defendant thereupon preferred this second appeal to the High Court.

Dr. Rash Behary Ghose (with him *Babu Sushil Madhub Mullick*), for the appellant. Question is whether a suit brought by the sole surviving member of a Committee appointed under the Religious Endowments Act is maintainable,—I submit, it is not. The suit brought, although it purports to be a suit for rent, is in reality one for establishment of title. The Court of first instance relied upon an unreported decision of this Hon'ble Court in Civil Rules Nos. 943-944 of 1904. That case is quite distinguishable from the present one. There the idol was represented by the surviving trustees. Only when the appeal was allowed by the lower Appellate Court, it was for the first time suggested that the decree should be vacated on the ground that one of the fellow-trustees was dead when the judgment was pronounced. The Madras High Court in the case of *Santhalva* v. *Manjanna Shetty* (1) held that such a suit was not maintainable. The language of sections 7

(1) (1910) I. L. R. 34 Mad. 1.

1911

RAGHUNANDAN RAMANUJA DAS v. BIBHUTI BHUSHAN MUKERJEE.

and 10 of the Religious Endowments Act is mandatory. There cannot be a Committee if the number is reduced from three, as in this case, to one. The analogy of the law governing corporate bodies does not apply to the case of a trustee appointed under section 7 of the Act. The Revenue Officer in this case decided a question as to the validity of a title, which he could not do under Act VIII of 1885: *Secretary of State for India* v. *Nitye Singh* (1).

Babu Ram Chander Majumdar (with him *Babu Lalit Mohan Chatterjee*), for the respondent. The other side is not entitled to take the point as to the maintainability of the suit, as it was given up in the lower Appellate Court. It was not even mentioned. At the time of the suit there was only one member. A suit by such a member of the Committee is maintainable. I rely upon the unreported decision of the High Court. Upon the death of four members of the Committee, the Committee do not cease to exist or the power of the Committee is not suspended. The Committee would exist even if there was a vacancy, and the surviving members would be entitled to do certain acts: see section 10 of the Religious Endowments Act. On the death of a trustee the joint office survives: Lewin on Trusts, p. 293. The law governing corporate bodies is applicable to a case like this.

Under section 9 of Regulation VII of 1822, a Revenue Officer had power to record all *lakheraj* tenures. The entry having been recorded under the provisions of the said Regulation, is admissible in evidence under section 35 of the Evidence Act.

A Settlement Officer has jurisdiction to decide whether the relationship of landlord and tenant exists between the parties: *Dharani Kanta Lahiri* v. *Gaber Ali Khan* (2). The Full Bench case relied on by the

(1) (1893) I. L. R. 21 Calc. 38. (2) (1902) I. L. R. 30 Calc. 339.

other side has no application. The defendant denied the relationship of landlord and tenant, and therefore the Revenue Officer had jurisdiction to decide the question.

Dr. Ghose, in reply. An admission by counsel, of a question of law, cannot bind his client: *Beni Pershad Koeri* v. *Dudhnath Roy* (1). The decision of the unreported case is only an *obiter dictum*.

Cur. adv. vult.

D. CHATTERJEE and TEUNON, JJ. This appeal arises out of a suit for rent brought by the sole surviving member of a Committee appointed under section 7 of the Religious Endowments Act (XX of 1863). The Committee originally consisted of three persons as required by the section, but the two other members being dead and their successors not having been appointed at the time, the suit was brought as stated above by the sole survivor. Successors to the deceased members were appointed pending the suit, but the learned Deputy Collector refused to add them as parties and the plaintiff chose to carry on the suit alone. The plea of the incompetency of the suit was overruled by the first Court, and was not argued in appeal before the District Judge. It has, however, been strenuously urged before us that as a point of law going to the root of the jurisdiction, we are bound to entertain the plea and we have allowed the point to be discussed. Section 7 provides that a Committee of three or more persons shall be appointed once for all by the Local Government; section 8 provides for the manner in which the members are to be elected; section 9 says the members shall hold office during life subject to removal by the Civil Court; and section 10 provides for the filling up of

(1) (1899) I. L. R. 27 Calc. 156.

1911

RAGHUNANDAN RAMANUJA DAS v. BIBHUTI BHUSHAN MUKERJEE.

vacancies by the electorate or, on their failure, by the Civil Court. The Committee is appointed "once for all" by the Local Government which is *functus officio* thereafter, all vacancies however caused being filled up by election or by the Civil Court. Even if all the members of the Committee die, no new Committee has to be appointed by the Civil Court: see *Syed Mahomed Athor* v. *Sultan Khan* (1).

The Committee, therefore, is not dissolved by the death of one or all the members, but continues as a legal entity, the *personnél* only being reconstituted. It has, therefore, been considered as analogous to a corporation-aggregate, and its proceedings, when not expressly provided for by the Act, have been held to be regulated by rules applicable to corporations: see *Ananta Narayana Ayyar* v. *Kuttalam Pillai* (2). The several members of a corporation and their successors constitute but one person in law. "There is no reason why a corporation should not continue to live, although the last of its members is dead:" Salmond's Jurisprudence, p. 298. Similarly, a Committee under Act XX is a legal person endowed with powers which do not belong to the individual members who may go and come, but this offspring of the law remains the same. It has been created "once for all," and does not die on the death of any or even all of its members. It may remain dormant for a time, but awakes and becomes active as soon as the vacancies begin to be filled up. The surviving member or members, therefore, of such a Committee may continue the office of the Committee until the vacancy or vacancies are filled up in due course. Mr. Lewin in his treatise on Trusts, p. 293, 12th edition, says: "It is a well-known maxim that a bare authority committed to several persons is determined by the death of any one; but

(1) (1900) 4 C. W. N. 527.

(2) (1899) I. L. R. 22 Mad. 481.

if coupled with an interest, it passes to the survivors." The members of the Committee have not a bare authority; they can grant leases and create interests in the endowed property consistent with the purpose of the endowment, and have, therefore, an interest coupled with authority. Their position may be likened to that of guardians of the deity or institution placed in their charge. It was held in the case of *Eyre* v. *Countess of Shaftsbury* (1) that when a guardianship is devised to three persons without saying "and to the survivor or survivors of them," yet the survivor shall have it. In the case of *Doe* v. *Godwin* (2), in construing an Act of Parliament, 46 Geo. 3, C. 97, which authorised five trustees named therein to dispose of certain houses and provided in very strong terms that in the case of the death of one or more of them, the survivors should and they were required to appoint new trustees, the Court held that the proviso was analogous to the common one in Settlements; and expressed an opinion that the clause was not imperative but merely of a directory character, so that a conveyance by four of the five trustees after the death of one of them and before the appointment of his successor was good. The provisions of Act XX of 1863 are very similar and seem to invite a similar construction. We are further supported in this view of the law by an unreported decision of Sir Francis Maclean, C.J. and Stevens, J. in a case of the same nature in Civil Rules Nos. 943 and 944 of 1903, decided on the 10th of March, 1904, where the learned Judges said "a Committee is not *ipso facto* dissolved when one of its members dies, if there be provision for filling up the vacancy." Their

(1) (1722) 2 P. W. 103; 1 White & Tud. L. C. 495.

(2) (1822) 1 Dow. & R. 259.

1911

RAGHUNANDAN RAMANUJA DAS v. BIBHUTI BHUSHAN MUKERJEE.

Lordships held that the suit was maintainable by two of the surviving members of the Committee.

We, therefore, respectfully dissent from the decision of the Madras Court in the case of *Santhalva* v. *Manianna Shetty* (1), and hold that the suit was competent.

The next point that is raised is that of adverse possession. The defendant, however, did not raise this point in the Courts below, and as this is a mixed question of fact and law, we do not think that we should be justified in going into it in second appeal.

It is further argued that the Court of Appeal has relied upon inadmissible evidence, namely, the settlement records of 1881 and 1897. The Bengal Tenancy Act, Chapter X, was extended to Orissa in September 1891, so that the settlement of 1881 was not under the Bengal Tenancy Act. It was evidently under Regulation VII of 1822. Section 9 of the Regulation provides that all *lakherai* tenures shall be carefully recorded with specification of the nature of the tenure; the said records are, therefore, relevant under section 35 of the Evidence Act. The later records of 1897 were admittedly under Chapter X of Act VIII of 1885, and, as there was no dispute, the presumption under section 109 was clearly applicable. There is, therefore, no substance in this ground also.

The result, therefore, is that the appeal is dismissed with costs.

Appeal dismissed.

S. C. G.

(1) (1910) I. L. R. 34 Mad. 1.

CIVIL RULE.

Before Mr. Justice Mookerjee and Mr. Justice Carnduff.

EAST INDIAN RAILWAY COMPANY

v.

SISPAL LAL.*

1911

Sept. 5.

Carriers—Railway Company—Delivery of goods—"Clear receipt" by consignee—Loss of goods—Liability of Company for the loss.

Certain bales of cloth tendered to the East Indian Railway Company for transit were in due course delivered to the consignee, who granted "clear receipt" for them. Subsequently, the consignee discovered that some pieces of cloth out of the bales were missing, the same having been lost while in the custody of the Railway Company. In a suit brought by the consignee for compensation :

Held, that the grant of "clear receipt" and acceptance of delivery do not affect the right to compensation for loss or damage proved to have been caused to the goods while in the custody of the carriers.

Per MOOKERJEE, J. A receipt acknowledging a delivery of the goods in good condition is only *primâ facie* evidence of the fact and raises a presumption in favour of the carriers, which may be rebutted by the consignee.

Per CARNDUFF, J. A bailor who, in the absence of any agreement on the subject, has given the bailee a receipt for the goods bailed, is not, *ipso facto*, precluded from proving that the goods were in reality damaged or deficient in quantity when delivered to him.

RULE granted to the petitioners, the East Indian Railway Company.

A suit was instituted in the Court of Small Causes at Buxar against the East Indian Railway Company for the recovery of Rs. 100 as damages for the loss of certain pieces of cloth delivered to the said Company for transit from Delhi to Buxar.

* Civil Rule No. 3026 of 1911, against the decision of S. K. Rahman, Small Cause Court Judge, Buxar, dated April 10, 1911.

1911

EAST INDIAN RAILWAY COMPANY v. SISPAL LAL.

On the 7th October 1910, the East Indian Railway Company received from the consignor four bales of cloth at Delhi to be delivered to one Sispal at Buxar, and on the 15th October, 1910, the day after their arrival at Buxar, the consignee took delivery of the said four bales, apparently in good condition, and granted "clear receipt" for the same.

On the 5th December, 1910, the said Company again received another bale of cloth at Delhi to be delivered to Sispal at Buxar, and on the 14th December, 1910, the day after its arrival at Buxar, the consignee took delivery of the said bale, apparently also in good condition, and, as before, granted "clear receipt" for it.

Subsequently, the consignee complained of the loss of some pieces of cloth from the above two consignments while they were in the custody of the Railway Company, and put in his claim against the Company for damages. On the Company refusing to pay any compensation, the consignee instituted a suit, on the 7th March, 1911, in the Court of Small Causes at Buxar, for recovery of Rs. 100 as damages for the said loss. The Railway Company defended the suit, maintaining that they were not liable for any damages once the goods had left their custody and had been delivered to the consignee in good condition and under a "clear receipt," and no objection was made by the consignee at the time when delivery was taken.

On the 10th April 1911, the Small Cause Court Judge held that, though the articles were taken out of the bales while they were in the custody of the Company, the Company's liability ceased when delivery was taken and a "clear receipt" granted by the consignee, but in order to safeguard the public interest, the Company was bound to take some steps to stop this sort of action, which no doubt frequently happened, and he accordingly decreed the

suit in the plaintiff's favour, granting him Rs. 50 as damages. The Railway Company, thereupon, moved the High Court to set aside that judgment and decree and obtained the present Rule.

Mr. G. B. McNair and *Babu Joy Gopal Ghosh*, for the petitioners, in support of the Rule.

Babu Birai Mohan Mazumdar, for the opposite party, showed cause.

MOOKERJEE J. This Rule raises an important question of law about the liability of a Railway Company to pay compensation for loss of goods or damage caused to them, while in their custody, though the claim is not put forward by the consignee till after he has taken delivery and granted "a clear receipt." The circumstances, under which the question requires consideration, may be briefly narrated as found by the Small Cause Court Judge. On the 7th October, 1910, the opposite party tendered to the East Indian Railway Company at Delhi four bales of cloth for despatch to Buxar. The goods arrived at Buxar on the 14th October; the consignee took delivery of the bales which were apparently in good condition, and granted a simple receipt. On the 5th December, 1910, another bale was delivered to the Company at Delhi for carriage to Buxar, and duly carried there in apparent good condition. The consignee took delivery on the 14th December, and granted receipt as before. He subsequently reported to the Company that some pieces of cloth were missing from the bales; the Company refused to entertain the claim, whereupon, on the 7th March, 1911, the consignee instituted this suit in the Court of Small Causes at Buxar for recovery of Rs. 100 as damages for the loss of the pieces of cloth. The Company resisted the claim substantially on two

1911

EAST INDIAN RAILWAY COMPANY v. SISPAL LAL.

MOOKERJEE J.

grounds; they denied, in the first place, that the goods had been lost, while the bales were in their custody; they contended, in the second place, that, as the consignee had accepted delivery and granted "a clear receipt," his right to compensation had been extinguished, even if it was proved that the loss had taken place while the goods were in the custody of the Company. The Small Cause Court Judge has found upon the evidence that the articles were taken out of the bales while they were in the custody of the Company; he has negatived the suggestion of the defence that the articles had been abstracted by the plaintiff or himself his men after delivery of the goods. It may be observed at this stage that the Small Cause Court Judge has recorded the evidence somewhat carelessly, and the notes of the depositions of the witnesses are not always intelligible. The Court is bound, however, to accept his finding upon the question of fact, namely, that a portion of the goods consigned was lost while the bales were in the custody of the Company. Upon this finding, the Small Cause Court Judge has stated that in his view of the law the plaintiff is not entitled to succeed, because he has taken delivery and granted a clear receipt; but the Small Cause Court Judge has held that, "in order to safeguard the public interest, the Company is bound to take some steps to stop this sort of action," and he has accordingly made a decree in favour of the plaintiff for Rs. 50. On behalf of the Company, we have been invited to set aside this decree on the ground that it is obviously erroneous and that the judgment itself is not self-consistent. In answer to the Rule, it has been argued on the other hand by the learned vakil for the plaintiff that the view of the law accepted by the Small Cause Court Judge is erroneous, and that if his decree is open to attack, it

is liable to be assailed on the ground that the plaintiff has not been awarded damages in full. The question, therefore, arises, whether the plaintiff has lost his right of action because he has taken delivery and granted a clear receipt.

In support of the Rule, it has been argued that the question ought to be answered in the affirmative, and reference has been made to Macnamara on Carriers, 1908, Section 214, where it is stated that, when goods are delivered by a Railway Company at the proper place and at the proper time, the consignee is bound to examine them and ascertain whether they are in good order, and, if he does not intimate objection, it will be presumed that they were delivered in good order. The learned author relies upon the case of *Stewart* v. *North British Railway Company* (1) as authority for this proposition. The principle in question is perfectly sound, but is of no assistance to the petitioners. The case of *Stewart* v. *North British Railway Company* (1) is not an authority for the proposition that, if a consignee takes delivery and grants a clear receipt, he loses his remedy, even if he is able to establish conclusively that the goods were damaged or partially lost while in transit. In fact, the contrary view was adopted in *Johnston & Sons* v. *Dove* (2), where it was ruled that, if a consignee of goods (which, as a matter of fact, have been damaged in transit, though such damage is not visible at first sight) grants a clear receipt, accepts delivery, and breaks bulk without judicial inspection or notice to the carrier, he does not lose his right to compensation; the fact that he has granted a receipt is an element in the proof of damages, but is no bar to the claim. A similar view was taken in *Pearcy*

(1) (1878) 5 Rettie 426. (2) (1875) 3 Rettie 202.

1911

EAST INDIAN RAILWAY COMPANY v. SISPAL LAL.

MOOKERJEE J.

v. *Player* (1), where Lord Craighill observed as follows: "The counsel for the defender has also argued that the neglect of the pursuer to examine the luggage after delivery, and the delay of 24 hours in reporting the loss to the defender, bars his right to recover. The former may affect the proof of the question, was the portmanteau delivered? But assuming non-delivery to be proved, it cannot operate as a bar, there not having been in the contract between the parties a provision or an implication that should the goods delivered be taken without challenge at the time, right to recover for any undelivered article should be forfeited." This is obviously good sense, and based on sound legal principles. The right to compensation has accrued as the result of the loss; the acceptance of the goods without protest may raise a strong presumption that the alleged loss has not taken place; but, if it is proved by reliable evidence that, as a matter of fact, there was loss or damage to the goods while they were in the custody of the Railway Company, it is difficult to appreciate how on principle the position can be maintained that the acceptance of delivery operates to extinguish the right to compensation. The question has been repeatedly raised in the Courts of the United States, and the view has been uniformly maintained as well founded on principle that grant of clear receipt and acceptance of delivery do not affect the right to compensation for loss or damage proved to have been caused to the goods while in the custody of the carriers. One of the earliest cases on the subject is *Oakey* v. *Russel* (2), where it was ruled that, although acceptance of the goods by the consignee without objection and with knowledge of their defective

(1) (1883) 10 Rettie 564; 20 S. L. R. 376.

(2) (1827) 6 Martin N. S. (La.) 58.

condition precludes recovery for damages thereto [*Munro* v. *Ship "Baltic"* (1), *Marcy* v. *Warner* (2)], yet acceptance will not operate as waiver of objection for damage not apparent. Again, in *Bowman* v. *Teall* (3), it was held that the receipt of the goods alone, with no stipulation that they are accepted in full performance of the contract, does not constitute a waiver of claim for damages for which the carrier may be liable: *Alden* v. *Pearson* (4), and *Lesinsky* v. *Great Western Despatch* (5). The question was elaborately discussed in the case of *The Elmira Shepherd* (6), where it was ruled that the claim for compensation was not lost, though the consignee had granted a clear receipt, accepted delivery, and sold the goods. Woodroffe J. observed that in cases of this description, the conduct of the consignee would be scrutinised carefully, and the Court would receive his evidence with caution; but if the evidence proved that the loss or damage occurred while the goods were in transit, compensation could be claimed notwithstanding delivery and acceptance. To put the matter briefly, a receipt acknowledging the delivery of the goods in good condition is only *primâ facie* evidence of the fact: *Porter* v. *Chicago Railway Company* (7), which must be taken to qualify the somewhat broad statement in *Skinner* v. *Chicago Railway Company* (8). As recent illustrations of this principle, reference may be made to the cases of *Mears* v. *New York Railway Company* (9), and *Southern Railway Company* v. *Ashford* (10). In

(1) (1810) 1 Martin O. S. (La.) 194.
(2) (1865) 17 La. Ann. 34.
(3) (1840) 23 Wendell N. Y. 306; 35 Am. Dec. 562.
(4) (1855) 69 Mass. 342.
(5) (1881) 10 Mo. App. 134.
(6) (1871) 8 Blatchford 341; 8 Fed. Cas. 579.
(7) (1865) 20 Iowa 73.
(8) (1861) 12 Iowa 191.
(9) (1902) 52 Atl. 610; 56 L. R. A. 884.
(10) (1900) 126 Alabama 591; 28 South. 732.

1911

EAST INDIAN RAILWAY COMPANY v. SISPAL LAL.

MOOKERJEE J.

the former of these cases, a piano was delivered by the carrier to the consignee, who signed a clear receipt. When the package was taken home and opened, it was discovered that the piano had been spoiled by water. It was held that the consignee was entitled to damages, notwithstanding the grant of a "clear receipt" and acceptance of delivery. In the second case, the consignee removed his dog from the railway van; but when he took it home, he discovered that it had been injured. It was held that he was entitled to claim damages, and that the fact that he had granted a receipt for delivery in good condition was not a conclusive defence against recovery of compensation. The principle, therefore, that a receipt acknowledging a delivery of the goods in good condition is only *primâ facie* evidence of the fact, and raises a presumption in favour of the carrier which may be rebutted by the consignee, is firmly established; and it is manifestly consistent with rules of justice, equity and good conscience. The inference, therefore, follows that the decree made by the Small Cause Court Judge is correct, though his reasons are erroneous.

The result is that the Rule is discharged with costs.

CARNDUFF J. I agree. The short point of law raised by this Rule seems to be as to whether a bailor who, in the absence of any agreement on the subject, has given the bailee a receipt for the goods bailed, is, *ipso facto*, precluded from proving that the goods were in reality damaged or deficient in quantity when delivered to him. I have myself been unable to find any authority, either in England or here, for holding that he is; and my learned brother has shown that it has been held elsewhere, for reasons which seem to me to be most cogent and convincing, that he is not.

O. M. *Rule discharged.*

APPELLATE CIVIL.

Before Mr. Justice Chitty and Mr. Justice N. R. Chatterjea.

DWARKA NATH ROY

v.

SARAT CHANDRA SINGH ROY.*

1911

July 17.

Hindu Law—Succession—Mitakshara—Stridhan—Maiden's stridhan—Father's brother's son—Sister—Sister's son.

Under the Mitakshara school of Hindu law, a sister (father's daughter) and a sister's son (father's daughter's son) are entitled to succeed to a maiden's *stridhan* in preference to a father's brother's son.

Per N. R. CHATTERJEA J. Under the Mitakshara law, in the absence of any rule determining the nearness among relations of the father in the case of succession to a maiden's *stridhan*, the question should be decided by analogy to the order of succession to the *stridhan* of a childless woman married in a disapproved form, so far as it is applicable, for in both cases the succession is confined to the father's family.

The *stridhan* of a childless woman married in a disapproved form, devolves, after the father, in the same manner as if it had belonged to the father himself, and the succession follows the order laid down in the text of Yajnavalkya regulating obstructed succession.

Quære: Whether the son or grandson of the father in such a case takes before the father or after him and before the other heirs mentioned in the said text.

APPEAL by Dwarka Nath Roy and others, the defendants.

This appeal arose out of a suit to recover certain properties by right of inheritance to a deceased maiden's *stridhan*.

The facts appear sufficiently from the judgments.

* Appeal from Original Decree, No. 524 of 1908, against the decree of Ali Ahmed, Subordinate Judge of Rungpur, dated Sept. 12, 1908.

1911

DWARKA NATH ROY v. SARAT CHANDRA SINGH ROY.

Upon the issue as to whether the plaintiffs or the defendants were preferential heirs of Panchi Barmani, the lower Court decided in favour of the plaintiffs.

The defendants, thereupon, appealed to the High Court.

Mr. B. Chakravarti, Dr. Rash Behary Ghose, Babu Golap Chandra Sarkar, Babu Mohini Mohan Chakravarti and *Babu Jadu Nath Mandal*, for the appellants.

Babu Jogesh Chandra Roy and *Babu Prakash Chandra Majumdar*, for the respondents.

Cur. adv. vult.

CHITTY J. This appeal arises out of a suit brought by the plaintiffs to recover certain property by right of inheritance to one Panchi Barmani who died unmarried on 6th June 1906. The Subordinate Judge has decided in the plaintiff's favour and the defendants have appealed. Kinu Sinha Roy, father of the plaintiffs, and Lachman Sinha Roy were two brothers. Kinu Sinha Roy died on 17th August 1894, leaving three sons, the plaintiffs, and Gopal Chandra, who subsequently died unmarried. Lachman Sinha Roy died on 18th April 1903, leaving a will dated 20th July 1902, of which his son-in-law, defendant No. 1, is executor. Lachman Sinha Roy left a widow Sasikala and three daughters, defendants Nos. 2 and 3, and Panchi Barmani. Lachman by his will made a disposition of his property in favour of his wife and daughters. The particulars are immaterial for our present purpose. Sasikala died on 18th April 1905, having made a will, dated 20th December 1904, by which she gave her property to her three daughters absolutely. The parties are by caste Khatrias and are governed by the Mitakshara School of Hindu Law. Kinu Sinha Roy

and Lachman Sinha Roy had separated in the lifetime of the former.

The only question which has so far been argued before us is that raised by issue 13, whether the plaintiffs are preferential heirs of Panchi Barmani, and entitled to her estate before her sisters Kanaklata (defendant No. 2) and Jogmaya (defendant No. 3) and Birendra Narain (defendant No. 4), son of defendant No. 2. If this be decided against the plaintiffs, their suit must fail. If in their favour, then other questions arising in the suit must be considered.

The law on the point admittedly lies within a very narrow compass, a text of Baudhayana cited in the Mitakshara, and the commentary on that text in the *Viramitrodaya*. The whole question turns upon the meaning to be given to the words "their nearest relations" in the *Viramitrodaya*. The text of Baudhayana is to be found in the Mitakshara, Chapter II, section XI, sub-section 30. For Baudhayana says: "The wealth of a deceased damsel, let the uterine brethren themselves take. On failure of them, it shall belong to the mother, or, if she be dead, to the father." In the *Viramitrodaya* (at page 240—1 of Golap Chandra Sarkar Shastri's Translation) we find 'besides as it is expressly declared that the father inherits the property of a maiden on failure of the mother, so the same order is proper in this case also; thus Baudhayana declares: "the wealth of a deceased maiden, let the uterine brothers themselves take; on failure of them it shall belong to the mother; in her default, to the father. On failure of the mother and the father, it goes to their nerarest relations." Who are their nearest relations? Had it not been for the elaborate arguments which were addressed to us, I should have been inclined to say that there was not much room for argument. As it is, it appears to me

1911

DWARKA NATH ROY v. SARAT CHANDRA SINGH ROY.

CHITTY J.

not to admit of any doubt. In this case Lachman and Sasikala were admittedly married according to one of the approved forms. The wife therefore became absolutely a member of her husband's family, and his relations were her relations. Now whether defendants Nos. 2, 3 and 4 be regarded as relations or as heirs of Lachman, it makes no difference. The word *sapinda* in the Mitakshara denotes affinity; "*sapinda* relationship arises between two people through their being connected by particles of the one body" (see Mayne's Hindu Law, 7th Ed., page 690). From this point of view defendants Nos. 2, 3 and 4 are manifestly nearer in relationship to Lachman and Sasikala than the plaintiffs. They would undoubtedly as heirs of Lachman be preferred to the plaintiffs. A daughter and a daughter's son both come in before a brother's son. The argument of the learned pleaders for the respondents resolves itself into this, that agnates must be preferred to cognates. But why? No authority was cited for the proposition which involves a constrained and unnatural interpretation of the words "their nearest relations" in the Viramitrodaya. As a matter of fact, it was the only possible line of argument by which the plaintiffs could hope to succeed. It was said that this was a case of first impression and that the point has not been decided before. A very similar case, however, arose in Bombay: see *Janglubai* v. *Jitha Appaji* (1). There also the question was as to the succession to the *stridhan* of a maiden, and the contesting parties were the maternal grand-mother, plaintiff, and the father's mother's sister's son, defendant. That case differed from the present in that the parents of the propositus had been married apparently according to

(1) (1908) I. L. R. 32 Bom. 409.

one of the blamed rites, and the contest was between the relations of the mother on the one side and of the father on the other. It was there argued (though unsuccessfully) for the plaintiff that the maternal relations were to be preferred to the paternal. Many of the remarks of Mr. Justice Chandavarkar are applicable to the present case, and I do not propose to go over the same ground again. I may, however, repeat one remark of the learned Judge that "the *sapindas*, *i.e.*, the nearest relations of the parents," means the *sapindas* of the fathers, who are also *sapindas* of the mother by virtue of her identity with her husband as half of his body. The various commentators who have touched on the question appear to be of the same opinion: see Dr. Gooroo Das Banerjee on Marriage and Stridhan, 2nd ed., p. 424; Mayne's Hindu Law, 7th ed., pp. 890-1; and Golap Chandra Sarkar Shastri's Hindu Law, 4th ed., p. 460. I would therefore hold that any one of defendants 2, 3 or 4 is entitled to succeed to the estate of Panchi Barmani in preference to the plaintiffs. As between defendants Nos. 2 and 3, the sisters, and defendant No. 4, the sister's son, I would leave the question of preference undetermined, as they are all before us in the position of defendants. Whatever may be the rights of the defendants as between themselves, the plaintiffs must fail. The learned Subordinate Judge in coming to the opposite conclusion has, I think, fallen into error by not adhering closely to the texts, and by confounding the case of succession to a female with that of succession to a male. Here we have to look for the heirs of the unmarried female in the nearest relations of her parents, and the only question is which of the parties before us answers to that description. It is unnecessary to go into any other questions arising in the suit.

1911

DWARKA NATH ROY v. SARAT CHANDRA SINGH ROY.

For the reasons given, I would allow the appeal and dismiss the plaintiffs' suit with costs in both Courts.

N. R. CHATTERJEA J. The plaintiffs-respondents in this case sued to recover certain properties by right of inheritance to one Panchi Barmani. The facts are these: There were two brothers, Kinu Sinha Roy and Lachman Sinha Roy, who were separate in mess and estate. The plaintiffs are the sons of Kinu Sinha Roy who died in 1894. Lachman Sinha died in 1903, leaving a widow Sasikala, and three daughters, Kanaklata (defendant No. 2), Jogmaya (defendant No. 3) and Panchi. By his will he gave to his widow some of his properties absolutely, and a life interest in others, and provided that on her death the daughters would get the latter in absolute right and appointed defendant No. 1 executor. Sasikala by her will dated the 20th December 1904 gave all the properties to the three daughters absolutely, and died on the 18th April 1905. Each of the daughters therefore obtained $\frac{1}{3}$rd of the properties as her *stridhan*. Kanaklata and Jogmaya were married in the life-time of their father, and Kanaklata has a son Birendra, the defendant No. 4. Panchi Barmani died unmarried in June 1906, and the plaintiffs as her father's brother's sons claim to be her nearest heirs.

The parties are governed by the Mitakshara School of Hindu Law. The lower Court decided in favour of the plaintiffs, and the defendants have appealed.

The 13th issue in the case raised the question whether the plaintiffs being the father's brother's sons are the heirs of Panchi Barmani in preference to Birendra, the defendant No. 4, and Kanaklata and Jogmaya, the defendants Nos. 2 and 3. If the issue is decided against the plaintiffs, the suit will fail, and it

will be unnecessary to try the other questions involved in the case.

The rule of succession to the *stridhan* property of a maiden is contained in a text of Baudhayana, which runs as follows:—

रिक्थं मृताया कन्याया गृह्णीयुं सोदराः स्वयं।
तदभावे भवेन्मातुस्तदभावे भवेत् पितुः॥

"The wealth of a deceased damsel let the uterine brothers themselves take; on failure of them, it shall belong to the mother; or if she be dead, to the father." (See Mitakshara, Chapter II, section 11, paragraph 30; Dayabhaga, Chapter IV, section 3, paragraph 7; and Dayakrama Sangraha, Chapter II, section 1, paragraph 1, where the same text is attributed to *Narada*).

The further succession after the father is not dealt with in the Mitakshara. The *Viramitrodaya*, after quoting the above text of Baudhayana, states: "On failure of the mother and the father, it goes to their nearest relations" (see *Viramitrodaya*, Chapter V, Part II, section 9; Golap Chandra Sarkar's Translation, pages 240-241). The words in the original are *matapitrorabhabe tat pratyasannagami* (मातापित्रोरभावे तत् प्रत्यासन्नगामि). But in what way this nearness is to be determined is not stated either in the Mitakshara or in the *Viramitrodaya*, and the question upon which the parties are at variance, is how is this nearness to be determined. There is no doubt that the sister (father's daughter) and sister's son (father's daughter's son) are nearer than the father's brother's son, but the questions raised on behalf of the plaintiffs-respondents are that the words *tatpratyasannah* have reference to *sapinda* relationship of the maiden herself, that the word *sapinda* means

1911

DWARKA NATH ROY v. SARAT CHANDRA SINGH ROY.

CHATTERJEA J.

"*sagotra sapinda*," and that a sister is no heir at all, and the sister's son is a very remote heir in the Benares school. In determining the nearness of relationship therefore we have to consider whether the *sapinda* relationship is to be traced through the father, and if so, in what order of succession and the meaning of the word "*sapinda*" as used in the Mitakshara in this connection.

In the absence of any express rule for determining the nearness of kinsmen in the case of succession to a maiden's property, we should see how this nearness has been determined in the case of succession to a married woman dying without issue.

The rule of succession to the *stridhan* of a married woman dying childless is thus laid down in the Mitakshara—"Of a woman dying without issue as before stated, and who had become a wife by any of the four modes of marriage denominated (*Brahma*, *Daiva*, *Arsha* and *Prajapatya*), the (whole) property as before described belongs in the first place to her husband; on failure of him, it goes to his nearest kinsman (*sapinda*) allied by funeral oblations. But in the other forms of marriage called *Asura*, *Gandharva*, *Rakshasa* and *Paisacha* the property of a childless woman goes to her parents, that is, to her father and mother. The succession devolves first (and the reason has been before explained) on the mother who is virtually exhibited (first) in the elliptical phrase *pitrigami*, implying 'goes' (*gachchati*) to both parents (*pitarau*); that is to the mother and to the father. On failure of them, their next-of-kin take the succession": see Mitakshara, Chapter II, section XI, paragraph 11, Colebrooke's Translation.

It is hardly necessary to point out that Colebrooke's translation of *sapindas* as allied by funeral

oblations is not correct: see *Umaid Bahadur* v. *Udoi Chand*(1).

The words used in the above text with reference to the heirs on failure of the husband are *pratyasannanang sapindanang* प्रत्यासन्नाणां सपिण्डाणां (nearest *sapindas*); and though the word used in connection with the rule of succession on failure of the father in the latter part of the text is only *pratyasannanang* प्रत्यासन्नाणां (nearest) and the word *sapindanang* सपिण्डाणां is not repeated, the author must have meant *pratyasannanang sapindanang* प्रत्यासन्नाणां सपिण्डाणां (nearest *sapindas*) as in the first part.

So that according to Vijnaneswara the nearest *sapindas* of the husband in the one case and the nearest *sapindas* of the father in the other are the heirs; but who are successively the next-of-kin in either case, in other words, what is the order of nearness among the kindred, is not stated in the Mitakshara.

Vyavahara Mayukha, Chapter IV, section X, Placita 28, dealing with the question of succession to a childless woman married in the two forms of marriage respectively states as follows:—

भर्तुरभावे तत्कुले तस्याः प्रत्यासन्नोलभते;

पित्रभावे च पितृकुले तस्याः प्रत्यासन्नः।

[In the one case] if there be no husband, then the nearest to her in his [*tat*] own family takes it; and [in the other case] if her father do not exist, the nearest to her in (her) father's family succeeds [for the law that]. "To the nearest *sapinda* the inheritance belongs" as declared by Manu denotes that the right of inheriting her wealth is derived even from nearness of kin to the deceased (female)

(1) (1880) I. L. R. 6 Cal. 119.

1911

DWARKA NATH ROY v. SARAT CHANDRA SINGH ROY.

CHATTERJEA J.

under discussion; and though the Mitakshara holds that on failure of the husband it goes to his (*tat*) nearest kinsmen (*sapinda*) allied by funeral oblations and on failure of the father, then to his (*tat*) nearest *sapindas*, yet from the context it may be demonstrated that her nearest relations are his nearest relations and (the pronoun "tat" being used in the common gender) it allows of our expounding the passage "those nearest to him through her in his own family," for the expressions are of similar import.'

So that according to Nilakantha the nearest relations of the woman in the husband's or the father's family, as the case may be, succeed, and relying upon the above text it was contended on behalf of the respondent that it was not the father's heirs but the nearest *sapindas* of the maiden in the father's family in the present case that are to succeed.

But *Vyavahara Mayukha*, though a very high authority in the Bombay school, cannot be accepted in the Benares school in preference to the *Mitakshara*, where the former differs from the latter. Besides I do not think that the above text of *Vyavahara Mayukha* by itself advances the case of the plaintiffs respondents. It merely shows that the nearest *sapindas* of the maiden in the father's family will succeed, but the nearest *sapindas* of an unmarried daughter will be the same as those of her father. So that after all, upon the question as to how the nearness among the *sapindas* is to be determined, the above text of the *Vyavahara Mayuk a* does not throw any light. The plaintiffs respondents can succeed by showing not only that the heirship is not to be traced through the father but also that the "nearest relations" mean nearest 'agnate *sapindas*.'

According to the Mitakshara the theory of *sapindaship* is based upon community of corporal particles or in other words consanguinity. Vijnaneshwara in explaining the word *sapinda* used by Yajnavalkya in the verse declaring that a man shall marry a girl who is not a *sapinda* states as follows :—"She is called his *sapinda*, who has (particles) of the body of same ancestor, etc., in common with him. *Sapinda* relationship arises between two people through their being connected by particles of one body . . . . therefore one ought to know that wherever the word *sapinda* is used there exists (between the persons to whom it is applied) a connection with one body either immediately or by descent."

समान एकः पिण्डो देहे यस्याः सा सपिण्डा...सपिण्डता च एक शरीरावयवान्वयेन भवति। . . . एवं यत्र यत्र सपिण्ड शब्दस्तत्र तत्र साक्षात्परम्परया वा एक शरीरावयवान्वयो वेदितव्यः।

Mitakshara Achara Adhyaya—see translation in West and Buhler's Digest, Vol. I, pp. 120-121.

The doctrine applies to *sapindaship* not only in its ceremonial aspect but for purposes of inheritance also. The point is now concluded by authority: see *Umaid Bahadur* v. *Udoi Chand* (1) and *Lallu Bhai* v. *Mankuvar Bai* (2); Mayne's Hindu Law, 7th Ed., p. 690.

It is, however, contended on behalf of the plaintiffs respondents that though the word *sapinda* means 'related by particles of body' it is used in the Mitakshara as meaning *sagotra sapindas*, and *bhinna gotra sapindas* are called *bandhus* and as the brother's son is a *sagotra sapinda* (agnate) he is entitled to preference to the sister's son who is a *bhinna gotra sapinda* (a cognate) and certainly to the

(1) (1880) I. L. R. 6 Cal. 119. (2) (1876) I. L. R. 2. Bom. 388.

1911

DWARKA NATH ROY v. SARAT CHANDRA SINGH ROY.

CHATTERJEA J.

sister, who is not in the line of heirs at all in Northern India.

Now, what is the meaning of the words *nearest sapindas* as used in the text of the Mitakshara quoted above? Do they mean *sapindas* in the restricted sense, *i.e.*, nearest *s gotra sapindas* or *sapindas* according to nearness or propinquity whether *sagotra* or not? It is true, as contended on behalf of the plaintiffs-respondents, that in the Mitakshara females generally are excluded unless expressly named, and near cognates are postponed to remote agnates, but that principle has no application to the case of succession to a male owner dying without male issue, and if the succession is to be traced through the male owner (the husband or the father as the case may be) according to the well known order laid down in the Mitakshara the principle contended for will not apply. It should also be remembered that there is a fundamental distinction between succession to a male and succession to *stridhan*. In the latter case preference is given to females and cognates in many instances to agnates.

Sir Gooroo Das Banerjee, in his Hindu Law of Marriage and Stridhan. 2nd Edition, page 360, after referring to the above text of the Mitakshara, observes as follows :—One thing, however, seems clear, namely, that the word *sapinda* in the foregoing passage is used in the same sense assigned to it in the *Achara Kanda* of the Mitakshara. It means *sagotra sapinda* . . . and also a *bhinna gotra sapinda* or *bandhu*.

The nearness of *sapindas* in the text of the Mitakshara quoted above has been determined by tracing the relationship from the husband or the father as the case may be according to the text of Yajnavalkya by at least one commentator and in several judicial decisions.

Kamalakara, one of the commentators, in dealing with this question states in the *Vivada-Tandava* as follows:—

भर्त्रभावे भर्त्तुः सम्बन्धिभिः प्रत्यासन्नैः पत्नीदुहितरश्चेत्याभिरप्यते, भर्त्तुः पत्नी सपत्नीदुहिता सपत्नीकन्येति विज्ञानेश्वरः।

"In default of the husband, the husband's nearest relations, the widow and the daughters also and the rest inherit, husband's widow, (*i.e.*,) the co-widow, (husband's) daughter, *i.e.*, daughter by a co-widow. This is stated by Vijnaneswara" (see *Vivada-Tandava*, Bombay Edition, page 462).

So that according to Kamalakara the nearness of kinsmen in the rule laid down in the Mitakshara is to be determined according to the well known text of Yajnavalkya relating to the succesion to a male owner dying without male descendants. The text runs as follows:—

"The wife and daughter also, both parents, brothers likewise and their sons, gentiles, cognates, a pupil and a fellow student. On failure of the first among these, the next in order is indeed heir to the estate of one who departed for heaven leaving no male issue. This rule extends to all classes.'

पत्नी दुहितरश्चैव पितरौ भ्रातरस्तथा।
तत् सुता गोत्रजा बन्धुः शिष्यः सब्रह्मचारिणः।
एषामभावे पूर्व्वस्य धनभागुत्तरोत्तरः।
स्वर्यातस्य ह्यपुत्रस्य सर्व्ववर्णेष्वयं विधिः।

याज्ञवल्क्यः।

West and Buhler referring to the above opinion of Kamalakara observe as follows:—"This opinion seems to be based on the consideration that as the *sapindas* inherits only through the husband, they virtually succeed to property coming from him, and

1911

DWARKA NATH ROY v. SARAT CHANDRA SINGH ROY.

CHATTERJEA J.

that consequently they must inherit in the order prescribed for the succession to a male's estate. Against this it may be urged that the word *pratyasanna* "nearest" if employed in regard to persons generally has the sense of "nearest by relationship," and that the list of heirs to a man without male descendants is not made solely with regard to nearness by relationship, since, for instance, it places the daughter's son before the parents and brothers, though he is further removed than the former and not nearer related than the latter. If the objection be admitted, we should take the words *pratyasanna* in its first sense, and assume that Vijnaneswara really intends "nearness by relationship" to be the principle regulating the succession of the *sapindas*. On this interpretation the heirs of a childless widow in the first instance would be those kinsmen related in the first degree, *i.e.*, rival wives of deceased, their offspring and the husband's parents, all inheriting together. Next the kinsmen related to the husband in the second degree as the husband's brothers, deceased step-children's children, etc., and so on to the sixth degree inclusive: see West and Buhler's Digest, volume I, page 518. Sir Gooroo Das Banerjee, in his Tagore Lectures, 2nd edition, at page 363, observes that in this conflict of authority it is not easy to say which view is correct, but Kamalakara's opinion is entitled to be followed as authority in the Benares school when it is not in conflict with that of any higher authority, and in the present instance the rule based on his opinion has the further recommendation of being simple, as it makes the order of succession to *stridhan* correspond after a certain point to that applicable to a man's property. It may also be urged that if this were not Vijnaveswara's meaning and if he had not referred to this known order of succession after the husband,

he would in all probability have expressed himself more explicitly: see also Jogendra Siromoni's Hindu Law, page 386. The conflict of authority referred to above does not affect the present case, for even according to the view taken by West and Buhler, the sister, as father's daughter, is entitled to preference to father's brother's son as a nearer relation.

According to the rule laid down by Kamalakara, the successive heirs after the husband of a woman married in an approved form dying without issue would be her husband's widow (rival wife), his daughter (step-daughter), his daughter's son (step-daughter's son), then the husband's mother, next his father and so on.

Following the above mode of determining nearness in the case of a childless woman married in a disapproved form, the successive heirs after the father would be the step-mother, the father's daughter (sister), father's daughter's son (sister's son), the father's mother, the father's father, the paternal uncle, his son, and the father's *gotraja sapindas* and *bandhus* in the same order in which they would succeed to his property.

In the case of a maiden, the heirs expressly enumerated are: (i) brother, (ii) mother, (iii) father. The succession then goes to their (mother and father's) nearest relations. There is no question in the present case that Sasikala was married in an approved form. So her husband's nearest relations would be her nearest relations also.

In the absence of any rule determining the nearness among relations of the father in the case of succession to a maiden's *stridhan*, the question, I think, should be decided by analogy to the order of succession relating to the property of a childless woman married in a disapproved form stated above,

1911

DWARKA NATH ROY v. SARAT CHANDRA SINGH ROY.

CHATTERJEA J.

so far as it is applicable, for in both cases the succession is confined to the father's family. I say, so far as it is applicable, because in the case of a maiden, the brother comes before the mother and the father, being in fact the first heir expressly named.

According to the views of some writers the son and the grandson of the husband, *i.e.*, the step-son and the step-grandson of the woman, come next after the offspring of the woman herself and before her husband, and according to the views of others they come in after the husband but before his other wives and such other wives, daughters, etc. Sir Gooroo Dass Banerjee, in his Tagore Lectures at pp. 363-64, places the son and the grandson of the husband, *i.e.*, the step-son and step-grandson of the woman, after the husband and before the co-widow and step-daughter, etc., as they are undoubtedly the nearest *sapindas* of the husband and, therefore, consistently with the view taken above, ought to come in before the co-widow and step-daughter, etc., and next after the husband. Similarly, he places the son and the grandson of the father, *i.e.*, the brother and the brother's son of a woman married in a disapproved form, after the father and before the step-mother and sister, etc. The same view was taken in the case of *Goj bai* v. *Shrim nt* (1), where the step-grandson was held to be a nearer *sapinda* than the co-widow or the husband's brother's sons.

It will be observed, however, that Kamalakara does not mention the son and the grandson of the rival wife in the order of succession after the husband. But the reason is, as pointed out by Telang J., in the case of *Gojabai* v. *Shrimant* (1) cited above, that Kamalakara dealt with the rights of the offspring

(1) (1892) I. L. R. 17 Bom. 114.

of the rival wife not under the exposition of words "husband's *sapindas*" but in the earlier portion dealing with the woman's own offspring, and he there actually cites the text of Manu, Chapter IX, 183 (that the son of a man by one of his wives is as a son to all his wives) and naturally from that point of view treats of the rival wife's children immediately after he had dealt with the rights of the woman's own offspring. In that view, the stepson and the step grand-son would take not as *s pindas* of the husband after him, but before him. In the case of a disapproved form of marriage the son and grandson of the father, *i.e.*, the brother and brother's son of the woman, may, I think, come in as the nearest relations and *sapindas* of the mother and, therefore, before those of the father. It is true in the case of *Janglubai* v. *Jetha Appaji* (1), it was held that the mother's relations are not to be preferred to those of the father, but the objections would not apply with the same force to the son and grandson who are the nearest relations and *s pindas* of the mother as well as of the father. The question is not free from difficulty, but it is not necessary to determine in the present case the precise position to be assigned to the son and grandson of the husband or the father, *i.e.*, whether they should come in as *sapindas* of the husband or the father and, therefore, after them and before the co-widow or the step-mother as the case may be, or before the husband and the father. The latter view is apparently taken by Kamalakara and according to him, therefore, the succession after the husband or the father would be governed by the rule of succession laid down in the text of Yajnavalkya quoted above.

It is contended on behalf of the plaintiffs-respondents that Kamalakara is a modern author, as it cites

(1) (1908) I. L. R. 32 Bom. 409.

1911

DWARKA NATH ROY v. SARAT CHANDRA SINGH ROY.

CHATTERJEA J.

Raghunandana a recent authority, and is not entitled to weight, but Kamalakara is of the same age as Nilkantha (who is said to be the cousin of Kamalakara) the author of the *Vyavahara Mayukha* and Mitra Misra, the author of the *Viramitrodoya*: see Sarvadhicari's Tagore Lectures, pp. 404—408. *Vivada-Tandava* of Kamalakara is one of the text-books of Benares school (see 1 Morley's Digest, Introduction ccxxi), and is a very high authority in that school (see Sarvadhicari's Tagore Lectures, p. 406, and Siromani's Hindu Law, pp. 29-30). Kamalakara is to be followed as authority in the Benares school, when it is not in conflict with any higher authority: see Sir Gooroo Das Banerjee's Tagore Lectures, pp. 363-364. The text of Kamalakara referred to above was cited as an authority by Chandavarkar J. in *Bhimacharya* v. *Ramacharya* (1).

The above principle of determining the nearness of *sapindas* after the husband or the father in the case of a childless woman married in an approved form and in a disapproved form, respectively, has been acted upon in the following cases.

In the case of *Bai Kesserbai* v. *Hunsraj Morarji*(2), where the question was whether a co-widow was entitled to succeed to the property of a woman married in an approved form dying without issue in preference to her husband's brother or husband's brother's son, it was held by the Privy Council that the former was entitled to succeed as the nearest *sapinda* of the husband. The case was decided with reference to the Bombay school, *viz.*, the Mitakshara, subject to the doctrine to be found in the *Vyavahara Mayukha* where the latter differs from it. But it was observed by the Privy Council referring to Mitakshara,

(1) (1909) I. L. R. 33 Bom. 452, 459. (2) (1906) I. L. R. 30 Bom. 431.

Chapter II, section XI, placita 8, 9 and 11:—"If the case rested on Mitakshara alone their Lordships are of opinion that the appellant would be entitled to succeed and that there could be no reasonable doubt that according to the Mitakshara definition of *sapinda*, husband and wife are *sapindas* to each other.

In *Krishnaji* v. *Shripati*(1), which also was a case of succession to the property of a childless woman, married in an approved form, the plaintiff who was the co-widow of the deceased claimed her estate as against the nephews of her husband (father-in-law's brother's grandsons) and it was contended on her behalf that in the absence of the husband the succession devolved upon his nearest *sapinda (tatpratyasanna sapinda)* and that the widow was the next-of-kin, and reliance was placed on the well-known rule of succession laid down in the Mitakshara. Jenkins, C. J., and Russell, J., held that the widow was the nearest surviving *sapinda* according to the order prescribed in the Mitakshara and entitled to succeed in preference to the nephews of the husband of the deceased. The case was decided with reference to the Mitak hara alone, which was the governing authority in the district from which it came up.

So in the case of succession to a woman married in a disapproved form, in *Raju Gramany* v. *Ammani Ammal* (2), the question was whether the plaintiff, who was the sister of a childless woman married in a disapproved form, was entitled to preference to the defendant, her son, and it was held by Subramaniya Iyer and Benson, J.J., that according to the Mitakshara the plaintiff as the daughter of the deceased woman's father takes precedence over the defendant his daughter's son.

(1) (1905) I. L. R. 30 Bom. 333. (2) (1906) I. L. R. 29 Mad. 358.

1911.

DWARKA NATH ROY v. SARAT CHANDRA SINGH ROY.

CHATTERJEA J.

It thus appears that in cases governed by the Mitakshara the authorities are in favour of the view that succession to the *stridhan* of a childless woman after the husband or the father, according as the marriage was in the approved or disapproved form, is regulated in the same order in which succession takes place to the husband or the father as the case may be, *i.e.*, it descends in the same way as if it had belonged to the husband or the father himself.

It is true that in none of the cases cited above there was any competition between an agnate and a cognate, but the order of succession was determined according to the order laid down in the Mitakshara regulating succession to a male owner, and the heirship was traced through the husband or the father.

The case of a maiden as already observed stands on the same footing as a childless woman married in a disapproved form, and the principles governing the order of succession to the latter is applicable to the case of a maiden.

In the case of *Janglubai* v. *Jetha Appaji* (1), the question related to the succession to the *stridhan* of a maiden and the competing claimants were her maternal grandmotner and her father's mother's sister, and the actual point to be determined was whether the *sapinda* of the mother or the *sapinda* of the father was entitled to preference. It was held that as the *sapindas* of the father are also the *sapind s* of the mother in virtue of her identity with her husband, the succession to the *stridhan* of an unmarried female goes to the *sapindas* of the father and the father's mother's sister was entitled to preference to the maternal grandmother. Chandavarkar, J., pointed out that the same rule of succession applies whether the deceased woman was a maiden or a woman married according to one of

(1) (1908) I. L. R. 32 Bom. 409.

the blamed rites and quoting the text of *Viramitrodaya* that in default of the mother and the father the succession goes to their nearest relations, observed that, according to that rule, in default of the heirs specified by Baudhayana the *sapindas* of the parents of a maiden inherit her property in the due order given in the text of Yajnavalkya regulating obstructed succession.

The same view is taken in Golap Chandra Sarkar Shastri's Hindu Law, 4th Editon, p. 460; and Sir Gooroo Das Banerjee, in his Tagore Lectures, 2nd Edition, p. 424, in dealing with the question of heirship to the property of a maiden, refers to Baudhayana's text and states his opinion as follows:—"On failure of the heirs mentioned in the text the next heirs would, I presume, be the paternal kinsman in order of proximity".

I have not alluded to the order of succession laid down in the *Viramitrodaya* based upon the authority of a text of Vrihaspati (see Viramitrodaya, chapter V, Part II, section 14; Golap Chandra Sarkar's Translation, page 243) according to which the sister's son is an heir, as it has been held that the line of succession given by *Viramitrodaya* is altogether inconsistent with that given in the Mitakshara and that it appears to give promiscuously the *sapindas* of the husband and those of the father without noticing the distinction in the devolution of the property depending upon the form of marriage of the deceased proprietress and cannot be accepted as authority in the Benares school which recognizes the authority of the *Viramitrodaya* only when it is not contradicted by the superior authority of the Mitakshara: see *Jagannath* v. *Runjit* (1), *Bai Kesserbai* v. *Hunsraj* (2); Sir Gooroo Das Banerjee's Tagore Lectures, 2nd Ed., pp. 361-362.

(1) (1897) I. L. R. 25 Calc. 354. (2) (1906) I. L. R. 30 Bom. 431.

1911

DWARKA NATH ROY v. SARAT CHANDRA SINGH ROY.

CHATTERJEA J.

I hold that in the present case the plaintiffs, the father's brother's sons, are not entitled to preference to the defendants Nos. 2 and 3 who are the father's daughters, or to defendant No. 4, the father's daughter's son. It is not necessary to decide in the present case as to who among the defendants themselves, *viz.*, the daughter and daughter's son, is entitled to preference. The plaintiff's suit will equally fail whether the daughter or daughter's son is the heir, and in this view of the case it is not necessary to enter into the other questions which are involved in the suit.

I accordingly agree that the appeal should be decreed, the decree of the lower Court set aside and the suit dismissed with costs in both Courts.

S. K. B.

Appeal allowed.

APPELLATE CIVIL.

Before Mr. Justice Mookerjee and Mr. Justice Carnduff.

RUKMINIMAYI DASI

v.

PARAN CHANDRA BHERA.*

1910

June 28.

Decree—Order dismissing an appeal for default—Appeal from such an order—Civil Procedure Code (Act V of 1908), s. 2, sub-s. (2); O. XLI, r. 17.

An order dismissing, for default, an appeal under Order XLI, rule 17 of the Code of Civil Procedure, is not a "decree" within the meaning of s. 2 of the Code, and as such is not appealable.

Radha Nath Singh v. *Chandi Charan Singh* (1), *Ramchandra Pandurang Naik* v. *Madav Purushottam Naik* (2), *Pohlar Singh* v. *Gopal Singh* (3) referred to.

SECOND APPEAL by Rukminimayi Dasi, the judgment-debtor.

This appeal arose out of the objection of the appellant to certain proceedings in execution of a decree made against him. The Court of first instance overruled his objection on the merits. Thereupon, the appellant appealed to the District Judge. On the day fixed for the hearing of the appeal, his pleader informed the Court that he had no instruction. The appeal was accordingly dismissed for default. Upon an application under rule 19 of Order XLI of the Civil Procedure

* Appeal from Appellate Order, No. 355 of 1909, from an order of W. N. Delevingne, District Judge of Hooghly, dated May 3, 1909, confirming that of Shyama Charan Banerjee, Munsif of Uluberia, dated March 2, 1909.

(1) (1903) I. L. R. 30 Calc. 660. (2) (1891) I. L. R. 16 Bom. 23.
(3) (1892) I. L. R. 14 All. 361.

1910

RUKMINI-MAYI DASI v. PARAN CHANDRA BHERA.

Code, the District Judge refused to re-admit the appeal. Against this order no appeal was preferred

The present appeal, before the High Court, was directed against the order of the District Judge, dismissing the appeal for default. At the hearing of the appeal, a preliminary objection was taken on the ground that the order of the District Judge dismissing the appeal was not a "decree" within the meaning of section 2, sub-section (*2*) of the Code; nor was it an order specified in the Code as an appealable order.

Babu Jnanendra Nath Sarkar, for the appellant.

Babu Gunada Charan Sen, for the respondent.

MOOKERJEE and CARNDUFF JJ. This is an appeal against an order made by the Court below, under Order XLI, rule 17 of the Code of Civil Procedure of 1908, read with section 2 of the Code. The appellant objected to proceedings in execution of a decree made against him. His objection was overruled on the merits in the Court of first instance on the 2nd March 1909. This order was clearly a decree, because it was an order made under section 47 of the Code. The appellant then appealed to the District Judge. When the appeal was called on for hearing, on the 3rd May 1909, his pleader intimated to the Court that he had no instruction. The appeal was consequently dismissed. He subsequently made an application to set aside this order, under rule 19 of Order XLI. The learned Judge, however, refused to re-admit the appeal. Up to the present time, no appeal has been preferred against the order of refusal. We are now concerned, therefore, with the appeal directed against the order of 3rd May 1909. A preliminary objection has been taken to the hearing of the appeal on the ground that the order is not a "decree" within the

meaning of section 2, sub-section (2) of the Code ; nor is it an order specified in the Code as an appealable order. On behalf of the appellant, reliance has been placed upon the decision of this Court in the case of *Radha Nath Singh* v. *Chandi Charan Singh* (1). In our opinion, the preliminary objection must prevail. Section 2 of the Code provides that the term "decree" does not include any order of dismissal for default ; consequently, it does not include an order of dismissal for default of an appeal under Order XLI, rule 17. It may be observed that under the Code of 1882, there was a divergence of judicial opinion upon this point. It had been held in the cases of *Ram Chandra Pandurang Naik* v. *Madhav Purushottam Naik* (2), and *Radha Nath Singh* v. *Chandi Charan Singh* (1), that an order of dismissal for default under section 556 of the Code of 1882 was a decree and appealable as such. On the other hand, in the case of *Pohkar Singh* v. *Gopal Singh* (3), it was assumed that an order of dismissal for default under section 556 of the Code was not a decree. The Code of 1908 settles this divergence of judicial opinion, and, under section 2 of the Code, we must hold that the order in question is not appealable.

The result is, that the preliminary objection is allowed and the appeal dismissed with costs.

Appeal dismissed.

S. K. B.

(1) (1903) I. L. R. 30 Calc. 660. (2) (1891) I. L. R. 16 Bom. 23.
(3) (1892) I. L. R. 14 All. 361.

CRIMINAL REVISION.

Before Mr. Justice Caspersz and Mr. Justice Sharfuddin.

1911

July 12.

UTTAM CHAND

v.

EMPEROR.*

Master and servant—Ganja—Illegal possession of ganja by servant acting on his own behalf and beyond the scope of his employment—Liability of the master for the act of the servant—Bengal Excise Act (Beng. V of 1909), ss. 46(a) and 56.

To support a conviction under s. 56 of the Bengal Excise Act, it is necessary to show not only that a servant was in the employ of the master, but also that he was acting within the scope of his employment and for the benefit of the latter.

Where a servant, whose duty was to remain at his master's shop and to conduct the business there, was found travelling to another place with *ganja* in his possession, in contravention of s. 46(*a*) of the Act :—

Held, that the master could not be convicted under s. 56, as his servant acted beyond the scope of his employment and for his own private purpose.

Suffer Ali Khan v. *Golam Hyder Khan* (1) referred to.

Emperor v. *Haji Shaik Mahomed Shustari* (2) distinguished.

THE petitioner, Uttam Chand, was the licensee of several excise shops in nine districts of East Bengal, including a *ganja* shop at Koilwar, in the district of Arrah. On the 23rd January 1911, one Lakhichand Ram, employed by the petitioner at the above *ganja* shop, was found on the road from Arrah to Bindhyachal, in the United Provinces, with $2\frac{1}{2}$ seers of *ganja* which he was transporting to the

* Criminal Revision, No. 649 of 1911, against the order of A. Hayat, Deputy Magistrate of Arrah, dated April 27, 1911.

(1) (1866) 6 W. R. Cr. 60. (2) (1907) I. L. R. 32 Bom. 10.

latter city. He was tried under s. 46(*a*) of the Bengal Excise Act (Beng. V of 1909), and convicted thereunder, on 6th February, by Mr. A. Hayat, Deputy Magistrate of Arrah. A prosecution was thereafter, on the report of the Sadar Excise Sub-Inspector of Arrah, started against the petitioner under s. 56 of the Act, and he was tried and convicted by the same Magistrate of such offence on the 27th April, and fined Rs. 200. It appeared that on the day of Lakhi's arrest the petitioner was at Bogra. The trying Court found that it was on account of the petitioner having an extensive business in the excise trade that he could not properly look after his numerous servants at his various shops, and that it was due to laxity of supervision on his part that Lakhi was able to leave the Koilwar shop and go to Bindhyachal with the *ganja* for sale there. The Magistrate was also of opinion that it was "extremely probable" that the *ganja* was taken from the petitioner's shop.

Mr. A. Caspersz and *Babu Surendra Kristo Bose*, for the petitioner.

The Offg. Deputy Legal Remembrancer (Mr. Sultan Ahmed), for the Crown.

CASPERSZ and SHARFUDDIN JJ. The petitioner, Uttam Chand, has an extensive business in excise shops, of which he holds a considerable number in nine districts of this province, including a *ganja* shop at Koilwar, in the district of Arrah. His Koilwar servant, Lakhichand, was convicted, under section 46 of the Bengal Excise Act (V of 1909), for being in possession of 2½ seers of *ganja* which he was attempting to transport from Arrah district to Bindhyachal. Lakhichand confessed his guilt.

The question now is whether the conviction of the petitioner, the master of Lakhichand, can be

1911

UTTAM CHAND v. EMPEROR.

supported on the language of section 56 of the Act. The section is as follows :—"When any offence punishable under section 46 is committed by any person in the employ and acting on behalf of the holder of a license granted under this Act, such holder shall also be punishable as if he himself had committed the offence, unless he establishes that all due and reasonable precautions were exercised by him to prevent the commission of such offence."

In the opinion of the convicting Magistrate, the petitioner has so many servants and so much business to attend to, that it was due to laxity of supervision on his part that his servant Lakhichand was able to leave his Koilwar shop and commence travelling to Bindhyachal with $2\frac{1}{2}$ seers of *gania*.

The substantial grounds argued on this Rule are two in number. With regard to the fourth ground specified in the petition, there is no finding in the judgment of the convicting Magistrate, that the $2\frac{1}{2}$ seers of *ganja* belonged to the petitioner, that is, came from his Koilwar shop. The Magistrate says :—"It is extremely probable that he (Lakhichand) took the *gania* from the Koilwar excise shop of the accused." That, however, is not a sufficient finding on which to implicate the master of Lakhichand. The other ground, the third in the petition, is that Lakhichand was acting outside the scope of his employment, and was not acting on behalf of the petitioner when he committed the offence under section 46(*a*) of the Excise Act.

Section 46 enumerates various offences, and we think that, if a master is to be held liable for all the acts of his servants, his liability must extend to all parts of section 46. As we put it to the learned Deputy Legal Remembrancer, who appeared to show cause, "if his servant, Lakhichand, had cultivated

ganja in the garden of his own private residence, would the master be liable for that act?" The only possible answer to this question is in the negative.

The language of section 56 is very clear, and does not in any way conflict with the general principle alluded to in *Suffer Ali Khan* v. *Golam Hyder Khan* (1), namely, that a master is not criminally responsible for the wrongful act of a servant, unless he can be shown to have expressly authorised it. That case was one of mischief, but the principle is of extensive applicability. Under section 56 the prosecution must show that Lakhichand was not only in the employ of the petitioner, but also acted on his behalf In removing the *ganja* from his shop, Lakhichand was, presumably, committing a criminal offence. His business was to remain at the Koilwar shop, and there to conduct sales for the petitioner; but when he travelled beyond the scope of that business, it is not possible to implicate the petitioner in his acts which were not done for the benefit of the petitioner, but rather for Lakhichand's private purposes. The expression "on behalf of" connotes some *benefit* to the person on whose behalf another person may act.

Various authorities have been cited to us on constructions of the Arms Act, the Opium Act and the Bengal Motor Car and Cycle Act. We have examined them all, but we have not derived such assistance from them as would warrant a detailed discussion. There is one case, to which we may allude, namely, *Emperor* v. *Haji Shaik Mahomed Shustari* (2), which was cited to us by the learned Deputy Legal Remembrancer, but it does not carry his arguments any further than the principle we have already mentioned.

(1) (1866) 6 W. R. Cr. 60.

(2) (1907) I. L. R. 32 Bom. 10.

1911

UTTAM CHAND v. EMPEROR.

No doubt when a servant does anything within the scope of his employment for that purpose, his action will be binding on the master, and the master will be criminally liable for any wrongful act of the servant. In the particular case cited, which was under the Indian Emigration Act (XXI of 1883), the master was deemed to be so liable.

In these circumstances, we think, the conviction cannot be supported. It is therefore set aside, and the Rule made absolute. Any fine paid or levied will be refunded.

E. H. M. *Rule absolute.*

CRIMINAL REVISION.

Before Mr. Justice Stephen and Mr. Justice N. R. Chatterjea.

1911

Nov. 9.

TUNOO MIA

v.

EMPEROR.*

Thumb-impression—Evidence—Taking of thumb-impression out of Court without objection made—Admissibility of such impression in a subsequent trial for giving false evidence—Evidence Act (I of 1872), s. 132, and Proviso—Penal Code (Act XLV of 1860), s. 193.

Where a Magistrate, believing that the complainant had given false evidence in the course of a trial, by denying the fact of a previous conviction, had his thumb-impression taken out of Court, for the purpose of identification in a future prosecution under section 193 of the Penal Code, and there was nothing to show that the latter had objected to the taking of it :—

Held, that the thumb-impression was admissible in a subsequent trial for giving false evidence, and that the proviso to s. 132 of the Evidence Act was not applicable, inasmuch as (i) the taking of such an impression was not equivalent to asking a question and receiving an answer, (ii) no

* Criminal Revision No. 898 against the order of J. A. Dawson, Additional Sessions Judge of Chittagong, dated July 15, 1911.

objection was made to the taking of it, and (iii) it was not taken in the course of a trial.

Queen v. *Gopal Doss* (1) and *Moher Sheikh* v. *Queen-Empress* (2) referred to.

ON the 22nd January 1910, the petitioner filed a complaint of defamation against one Mohim Chunder Guha, which was tried by the Joint Magistrate of Chittagong. He was examined at the trial, on the 19th September, and stated in cross-examination that he had never been in prison nor convicted at Rangoon. On the 27th October, Mohim applied to the Court for sanction to prosecute the petitioner under section 193 of the Penal Code in respect of such statement, and the latter was admitted to bail. The petitioner was further cross-examined the next day, and denied that he was convicted by a Rangoon Magistrate, on the 3rd April 1905, on a charge of criminal breach of trust as a servant, instituted by Fazul Rahman Chowdhry, or sentenced to rigorous imprisonment for two years and a fine of Rs. 1,000, or that he appealed against such conviction and sentence. In the meantime the records of the Rangoon case, which had been called for, had arrived and were in the Joint Magistrate's Court. On a subsequent date, while the petitioner was present in the Court verandah, the Magistrate sent for him and took him to the office of the Court Sub-Inspector, where his finger-prints were taken in the presence and under the directions of the Magistrate, with a view to future proceedings against him for giving false evidence. Mohim was convicted under section 500 of the Penal Code and fined Rs. 250 on the 30th November, and a proceeding under section 476 of the Criminal Procedure Code was immediately drawn up against the petitioner. He was put on trial before a Deputy Magistrate on a charge of giving false evidence. The

(1) (1881) I. L. R. 3 Mad. 271. (2) (1893) I. L. R. 21 Calc. 392.

1911

TUNOO MIA v. EMPEROR.

finger-prints of a man bearing the same name as the petitioner were given in evidence and proved to correspond with the impressions of the petitioner taken by the Joint Magistrate. There was also other evidence of his identity with the man convicted in Rangoon. The petitioner was convicted and sentenced, on the 28th June 1911, to rigorous imprisonment for three months and a fine of Rs. 50. He appealed to the Sessions Judge of Chittagong, who upheld the conviction and sentence on the 15th July. He thereupon moved the High Court and obtained the present Rule.

Mr. K. N. Chaudhuri and *Babu Khitish Chunder Sen*, for the petitioner.

Babu Manindra Nath Banerjee, for the Crown.

Cur. adv. vult.

STEPHEN and N. R. CHATTERJEA JJ. The petitioner in this case is Tunoo Mia, who has been convicted under section 193 of the Indian Penal Code of giving false evidence. A Rule has been granted calling on the District Magistrate to show cause why the conviction of, and sentence on, the accused should not be set aside and a re-trial of his case ordered, on the grounds that the evidence of thumb-impressions was admitted contrary to the provisions of section 132 of the Evidence Act, and also that the lower Courts have not dealt with a great deal of the evidence placed before them.

On the first point the facts are that the petitioner brought a charge of defamation against one Mohim Chunder Guha, and during his cross-examination swore that he was not convicted at Rangoon on a charge under section 408 of the Indian Penal Code brought by Fazul Rahman Chowdhry, and was not sentenced

to imprisonment and fine, and did not appeal. During the hearing of that case, the trying Magistrate took, or caused to be taken, the petitioner's thumb-impression, and that impression corresponds with the impression of a man who was convicted at Rangoon in the circumstances above stated. The argument indicated by the Rule as arising on these facts is that taking a thumb-impression is equivalent to asking a question and receiving an answer, and that, therefore, the thumb-impression is equivalent to an answer within the purview of the proviso to section 132 of the Evidence Act, and may not, therefore, be proved against the petitioner in the present proceedings. To this there are several answers.

In the first place, the taking of a thumb-impression is merely observing a characteristic feature of a man's body. Whether the Magistrate had a right to take the impression is a quesion we are not concerned with, and at present we need not consider whether the prisoner consented or not to the impression being taken. The impression was in fact taken, that is, an observation was made and recorded, and, in principle, the position is the same as if the Magistrate had photographed the appellant, or noticed a deformity or a scar, matters which might certainly be proved if they were relevant. The analogy between taking a thumb-impression and asking a question, therefore, breaks down.

In the second place, it was held by the majority of the Court in *Queen* v. *Gopal Doss* (1) that, where an accused person has made a statement voluntarily, and without compulsion on the part of the Court, it may be used against him on his trial, if relevant, that is, the proviso to section 132 does not apply, unless the witness objects to answer the question; and this decision has been followed by this Court

(1) (1881) I. L. R. 3 Mad. 271.

1911

TUNOO MIA v. EMPEROR.

in *Moher Sheikh* v. *Queen-Empress* (1): see too the note to section 132 in Woodroffe's Evidence Act. In this case there is nothing to show that the appellant made any objection to the impression of his thumb being taken, and the proviso to section 132 does not, therefore, apply.

In the third place, section 132 obviously only applies to questions asked in the Court of the trial, and there is nothing to show that the thumb-impression in this case was taken during the trial. It seems in fact to have been taken with a view to the possibility of this trial.

For these reasons, we are of opinion that the first reason for setting aside the conviction mentioned in the Rule must fail.

As to the second ground, the only evidence placed before the Court, with which it is suggested that it has not dealt, is the record of the case tried in Rangoon which, it is said, shows that the Fazul Rahman who was the complainant there described gave a different description of his own parentage and age, and the parentage of the Tunoo Mia then accused, from that given of the same matters by the Fazul Rahman who gave evidence in the present case. Fazul Rahman in the present case, however, was not asked to explain the discrepancy, nor were the contents of the Rangoon record said to bear the record in this case, though it is not before us, brought to his notice. We cannot, therefore, hold that the matter was not sufficiently considered by the lower Courts. No reason for our interference is, therefore, made out on the second ground mentioned in the Rule; and it must, therefore, be discharged.

E. H. M. *Rule discharged.*

(1) (1893) I. L. R. 21 Calc. 392.

APPELLATE CIVIL.

Before Mr. Justice Brett, Mr. Justice Mookerjee and Mr. Justice Vincent.

MAHAMMAD MEHDI HASSAN KHAN

v.

SHEOSHANKAR PERSHAD SINGH.*

1911

Sept. 7.

Sale for arrears of revenue—Revenue Sale Law (Beng. Act XI of 1859), ss. 10, 11 and 53—Estate held in common tenancy, meaning of—Purchase at a revenue sale of an undivided interest of specific mouzahs in an estate, in respect of which separate accounts were opened, effect of—Reference to a third Judge—Civil Procedure Code (Act XIV of 1882), s. 575—(Act V of 1890), s. 98(2).

Per MOOKERJEE and VINCENT JJ. (BRETT J. dissenting), that a proprietor who is not a recorded sharer of a joint estate held in joint tenancy, within the meaning of s. 10 of the Revenue Sale Law, nor a recorded sharer whose share consists of a specific portion of the lands of the estate within the meaning of s. 11, but is recorded as proprietor of an undivided interest held in common tenancy of a specific portion of the lands of the estate, but not extending over the whole estate within the meaning of s. 70 of the Land Registration Act, is not entitled to acquire the estate purchased by him at a sale, held for arrears of revenue, free of encumbrances.

The expression "estate held in common-tenancy" in s. 10 of the Revenue Sale Law means an estate where all the sharers have a common right and interest in the whole of the estate. Where, therefore, various co-sharers have certain interests, not in the whole estate, but only in particular villages of that estate, it cannot be said that the estate is held in common-tenancy.

Nunhoo Shahee v. *Ram Pershad Narain Singh* (1) followed.

APPEAL by the plaintiffs, Syed Mahammad Mehdi Hassan Khan and another.

* Appeal from Original Decree, No. 542 of 1908, from the decree of Bankim Chandra Mitter, First Subordinate Judge of Chapra, dated Sept. 10, 1908.

(1) (1873) 21 W. R. 38.

1911

MAHAMMAD MEHDI HASSAN KHAN v. SHEO-SHANKAR PERSHAD SINGH.

This appeal arose out of a suit brought by the plaintiffs for a declaration that defendant No. 1 had no right to sell the estate No. 3143 of the Saran Collectorate in execution of his mortgage-decree, and that the purchase of the said property at a revenue sale was free of all encumbrances. The plantiffs' allegation was that there was a mehal Raipatti bearing tauzi No. 3143, and 15 separate accounts were opened in respect of it, besides a residuary share; that the defendant No. 2 who was proprietor of account No. 1 executed three deeds of mortgage in favour of defendant No. 1; that subsequently the share in respect of which account No. 1 was opened was sold for arrears of revenue and purchased by defendant No. 6; that in 1897 defendant No. 1 brought a suit on the aforesaid three mortgage deeds against defendants Nos. 2 to 6, and obtained a decree by consent; that, on the 25th of March 1899, the share, in respect of which account No. 4 was opened, was put up for sale for arrears of revenue, and as there were no purchasers, the Collector took action under section 14 of Act XI of 1859; that none of the co-sharers having paid the arrears, the entire mehal was put up to sale, and purchased by defendant No. 7; that defendant No. 1 took out execution of his mortgage-decree and put up to sale the property in respect of which account No. 1 had been opened; that defendant No. 7 thereupon brought a suit for a declaration that his purchase was free of all encumbrances, and so the property in question could not be sold, and asked for a temporary injunction; that the injunction was granted on defendant No. 7 depositing Rs. 1,454-8; that in that suit defendant No. 1 pleaded that defendant No. 7 was a *benamidar* of the plaintiffs, that the plea was allowed and the suit was dismissed; that defendant No. 1 drew out the said Rs. 1,454-8 in deposit; that on the 2nd

March 1907 defendant No. 7 sold to plaintiff the mehal in question together with the right to sue for Rs. 1,454-8; and that defendant No. 1 again took out execution of his mortgage-decree and advertised the property for sale on the 5th of August 1907. The plaintiffs thereupon brought the present suit for the aforesaid declaration, and also to recover the amount withdrawn by defendant No. 1.

It appeared that the predecessors in interest of the plaintiffs owned shares in 14 or 15 mouzahs only out of the various villages, 18 in number, comprising the estate, and were not interested in every village in the estate. It further appeared that there was a separate account opened in the name of the predecessors in interest of the plaintiffs in 1872 by the Collector for their share in this mehal, purporting to be under section 10 of Act XI of 1859.

The defendant No. 1, who alone appeared in this suit, contended, *inter alia*, that the suit was not maintainable in the form it was brought, that the separate account No. 5 of which the plaintiffs were co-sharers was not opened according to Act XI of 1859, and therefore the plaintiff's purchase was not free of encumbrances; and that the plaintiffs were not entitled to recover the sum of Rs. 1,454-8, as defendant No. 7 did not appeal against the order allowing defendant No. 1 to withdraw the money.

The learned Subordinate Judge dismissed the plaintiff's suit. Against this decision the plaintiffs appealed to the High Court.

The appeal came on for hearing before Brett and Vincent JJ., and their Lordships, differing in opinion, delivered the following judgments:

BRETT J. The entire Mehal Raiputti, bearing tauzi No. 3143 in the Saran Collectorate, was sold for arrears of revenue by the Collector

1911

MAHAMMAD MEHDI HASSAN KHAN v. SHEO-SHANKAR PERSHAD SINGH.

This appeal arose out of a suit brought by the plaintiffs for a declaration that defendant No. 1 had no right to sell the estate No. 3143 of the Saran Collectorate in execution of his mortgage-decree, and that the purchase of the said property at a revenue sale was free of all encumbrances. The plantiffs' allegation was that there was a mehal Raipatti bearing tauzi No. 3143, and 15 separate accounts were opened in respect of it, besides a residuary share; that the defendant No. 2 who was proprietor of account No. 1 executed three deeds of mortgage in favour of defendant No. 1; that subsequently the share in respect of which account No. 1 was opened was sold for arrears of revenue and purchased by defendant No. 6; that in 1897 defendant No. 1 brought a suit on the aforesaid three mortgage deeds against defendants Nos. 2 to 6, and obtained a decree by consent; that, on the 25th of March 1899, the share, in respect of which account No. 4 was opened, was put up for sale for arrears of revenue, and as there were no purchasers, the Collector took action under section 14 of Act XI of 1859; that none of the co-sharers having paid the arrears, the entire mehal was put up to sale, and purchased by defendant No. 7; that defendant No. 1 took out execution of his mortgage-decree and put up to sale the property in respect of which account No. 1 had been opened; that defendant No. 7 thereupon brought a suit for a declaration that his purchase was free of all encumbrances, and so the property in question could not be sold, and asked for a temporary injunction; that the injunction was granted on defendant No. 7 depositing Rs. 1,454-8; that in that suit defendant No. 1 pleaded that defendant No. 7 was a *benamidar* of the plaintiffs, that the plea was allowed and the suit was dismissed; that defendant No. 1 drew out the said Rs. 1,454-8 in deposit; that on the 2nd

March 1907 defendant No. 7 sold to plaintiff the mehal in question together with the right to sue for Rs. 1,454-8; and that defendant No. 1 again took out execution of his mortgage-decree and advertised the property for sale on the 5th of August 1907. The plaintiffs thereupon brought the present suit for the aforesaid declaration, and also to recover the amount withdrawn by defendant No. 1.

It appeared that the predecessors in interest of the plaintiffs owned shares in 14 or 15 mouzahs only out of the various villages, 18 in number, comprising the estate, and were not interested in every village in the estate. It further appeared that there was a separate account opened in the name of the predecessors in interest of the plaintiffs in 1872 by the Collector for their share in this mehal, purporting to be under section 10 of Act XI of 1859.

The defendant No. 1, who alone appeared in this suit, contended, *inter alia*, that the suit was not maintainable in the form it was brought, that the separate account No. 5 of which the plaintiffs were co-sharers was not opened according to Act XI of 1859, and therefore the plaintiff's purchase was not free of encumbrances; and that the plaintiffs were not entitled to recover the sum of Rs. 1,454-8, as defendant No. 7 did not appeal against the order allowing defendant No. 1 to withdraw the money.

The learned Subordinate Judge dismissed the plaintiff's suit. Against this decision the plaintiffs appealed to the High Court.

The appeal came on for hearing before Brett and Vincent JJ., and their Lordships, differing in opinion, delivered the following judgments:

BRETT J. The entire Mehal Raiputti, bearing tauzi No. 3143 in the Saran Collectorate, was sold for arrears of revenue by the Collector

1911

MAHAMMAD MEHDI HASSAN KHAN v. SHEO-SHANKAR PERSHAD SINGH.

BRETT J.

proceeding under the provisions of section 14, Act XI, of 1859, and was purchased in the name of defendant No. 7, Babu Gopal Dass.

Fifteen separate accounts or *khatas*, besides one for the residuary shares, had been opened many years ago by the Collector, and defendant No. 2 being the malik of *khata* No. 1 executed three deeds of mortgage in favour of Babu Sheoshankar Pershad Singh, defendant No. 1, on the 9th December, 1886, 13th December, 1886 and 1st July, 1893, respectively. Afterwards the share in respect of which the *khata* No. 1 had been opened was sold for arrears of revenue due on that share, and purchased by Pardip Narayan Singh, defendant No. 6, subject to encumbrances. Defendant No. 1 afterwards brought a suit on the three mortgage bonds, No. 67 of 1897, against defendants Nos. 2 to 6, and obtained a decree by consent for Rs. 17,281-10.

On the 25th March 1899, the share in respect of which *khata* No. 4 had been opened, and which belonged to Kalika Prosad Singh, was put up for sale for arrears of revenue due on that share. No bids being offered, the Collector proceeded under section 14, Act XI of 1859, and put up the entire estate, No 3143, for sale, and it was purchased by defendant No. 7 for Rs. 1,600.

Defendant No. 1 then took out execution of his mortgage-decree, obtained against the proprietors of the share in respect of which *khata* No. 4 had been opened, praying for a sale of that share in execution of his decree. Thereupon defendant No. 7 brought a suit, No. 51 of 1904, to have it declared that his purchase of estate No. 3143 was free of all encumbrances, and asked for a temporary injunction restraining defendant No. 1 from selling the share. The injunction was granted on condition of defendant No. 7 depositing Rs. 1,454-8, being the amount of interest due on defendant No. 1's mortgage up to 1st August 1906. In that suit defendant No. 1 pleaded that it was incompetent, as defendant No. 7 was merely a *benamidar* of the two plaintiffs. The plea was allowed and the suit was dismissed. Defendant No. 1 then drew out the Rs. 1,458-8 from deposit.

On the 2nd March 1907, defendant No. 7 executed a deed of conveyance of the entire estate No. 3143 in favour of the plaintiffs for Rs. 12,000, the deed to be treated either as a deed of sale or a deed of release.

Defendant No. 1 again took out execution of his mortgage-decree and the share in respect of which *khata* No. 4 had been opened was advertised for sale on 5th August 1907.

Plaintiffs instituted the present suit on the 30th July 1907 for a declaration that defendant No. 1 is not entitled to sell the share in respect of which the *khata* No. 4 had been opened, on the ground that plaintiffs had purchased the entire estate free of all encumbrances. They also claimed as assignees of defendant No. 9 to be entitled to recover from defendant

No. 1 the sum of Rs. 1,451-8 deposited by defendant No. 7 to cover interest on the mortgage-debt of defendant No. 1.

The plaintiff's case, as set out in their plaint, was that as the entire estate had been sold for arrears of Gove nment revenue and purchased by defendant No. 7, a stranger, and subsequently purchased from him by the plaintiffs, the plaintiff acquired the estate free of all encumbrances. In the suit brought by defendant No. 7, No. 51 of 1904, to which reference had already been made, it was held that defendant No. 7 was merely a *benamidar* for the plaintiffs, but at the same time the opinion was expressed in the judgment that, as the plaintiffs were sharers in respect of whom a separate account had been opened by the Collector under the provisions of sections 10 and 11 of Act XI of 1859, they came within the exception stated in section 53 of the same Act and they purchased the estate free of all encumbrances.

This latter ground, though not expressly stated in the plaint, was the one on which the plaintiffs relied in support of their suit in the lower Court.

Numerous issues were framed in the lower Court, but those which are of importance for the purposes of this appeal are Nos. 5, 10, 11 and 6.

Issue No. 5 is as follows :—Are the plaintiffs purchasers of the estate free from encumbrances ?

Issue No. 10 runs as follows :—Were the plaintiffs such sharers in mehal Raiputti, tauzi No. 3143, before the revenue sale, dated the 6th June 1890, as to come within the exception mentioned in section 53 of Act XI of 1859 ?

Issue 11 is as follows :—Was there any separate account validly and legally opened under sections 10 and 11 of Act XI of 1859 on behalf of the plaintiffs ? If not, whether the defendant No. 1 is competent to question the validity and legality of the operation of the account effected before the revenue sale ?

Issue No. 6 is as follows :—Are plaintiffs as assignees of defendant No. 7 entitled to get a refund of Rs. 1,454-8 deposited by defendant No. 7 in Court and withdrawn by defendant No. 1 ?

The Subordinate Judge decided all these issues against the plaintiffs.

The plaintiffs claim to be sharers in the share in the estate in respect of which *khata* No. 5 had been opened by the Collector. In fact that separate account was opened on the 16th April 1872 by an order of the Collector of Saran. The original petition for the opening of a separate account was made by Ram Anugrah Singh, Rama Kanta Singh and Musammat Sarawan Koer (apparently the widow of a deceased brother of the two first mentioned persons). The mehal Raiputti, estate No. 3143, consists of 17 mouzahs, and the petition stated that Ram Anugrah and Rama Kanta were proprietors of certain shares in 15 of these, and that Musammat Sarawan Koer was the

1911

MAHAMMAD MEHDI HASSAN KHAN v. SHEO-SHANKAR PERSHAD SINGH.

BRETT J.

proprietor of the same share in the remaining two mouzahs. An objection seems to have been raised in the office of the Collector to the three persons joining in one petition, and accordingly an amended petition was filed, as ordered by the Collector, excluding Musamat Sarawan Koer, and on this amended petition the order was passed, on the 16th April 1872, directing that separate accounts be opened.

Subsequently, a portion of the shares of the heirs of Ram Anugrah Singh and of Rama Kanta Singh were sold by auction in satisfaction of the decrees obtained against them by the plaintiffs, and were purchased by the plaintiffs, and sale certificates were obtained by them on the 13th of June 1896. The plaintiffs appear to have been registered afterwards in the Collectorate. So far as the materials on the record go, the plaintiffs appear to have purchased only a portion of the shares which descended to the heirs of Ram Anugrah and Rama Kanta. That point is not clearly dealt with in the lower Court. All that the Subordinate Judge says in his judgment is that "the plaintiffs are fractional sharers in 8 or 9 mouzahs out of the 15 or 16 included in *khata* No. 5." No argument appears, however, to have been raised on the point that the plaintiffs were not purchasers of the entire shares of Ram Anugrah and Rama Kanta, the sharers in whose favour the separate account No. 5 was originally opened.

The learned Judge held that because Ram Anugrah and Rama Kanta Singh were persons who owned shares only in 15 or 16 mouzahs out of the 17 or 18 comprised in the mehal, and as such were neither sharers in all the mouzahs making up the mehal, nor the sole owners of the 15 or 16 mouzahs, nor even the sole owners of the 15 or 16 mouzahs which go to make up with the shares of the other mouzahs, the entire mehal tauzi No. 3143, therefore they were not sharers who under sections 10 and 11 of Act XI of 1859 could apply to the Collector to have a separate account opened in their favour. In consequence the Collector had no jurisdiction to open a separate account under sections 10 and 11 of Act XI of 1859 with them. In support of this finding, he relied on the decision of this Court in the case of *Nunhoo Shahee* v. *Ram Pershad* (1), and arriving at these conclusions, the Subordinate Judge held that the plaintiffs not being sharers in whose favour separate account had been legally opened by the Collector, they were not entitled to claim the benefit of the exception in section 53 of Act XI of 1859, and that therefore their purchase of the entire estate was not free from encumbrances.

Further, he held that even if the separate account opened by the Collector in favour of Ram Anugrah Singh and Rama Kanta Singh could

(1) (1873) 21 W. R. 38.

be held to be one opened under section 70 of Act VII (B.C.) of 1876, the Land Registration Act, they could not claim the benefit of section 53 of Act XI of 1859, as that section only included sharers in respect of whom separate shares had been entered under sections 10 and 11 of Act IX of 1859.

Accordingly he held that the plaintiffs were not entitled to the declaration sought for in the suit, nor to recover from defendant No. 1 the sum of Rs. 1,454-8 deposited by defendant No. 7.

The suit was dismissed with costs, and plaintiffs have appealed.

It appears that separate account or *khata* No. 1 was originally opened on the 6th January 1872 in the name of Kishendeo Singh, who is represented in the present case by defendants 2 to 5. This is the share against which defendant No. 1 has obtained the mortgage-decree.

Separate account or *khata* No. 4 was opened on the 21st March 1872 in the name of Kalikaprasad Singh. This is the share which defaulted.

Separate account on *khata* No. 5 was opened on 16th April 1872 in the names of Ram Anugrah and Rama Kanta Singh on the 16th April 1872. This is the share in which the plaintiffs claim right by purchase.

Now, rightly or wrongly these separate accounts had been opened for 35 years before the present suit was brought. Revenue had been all along paid in respect of these shares into the separate accounts, and it would appear that the shares in respect of which these separate accounts had been opened, had been put up for sale, each separately, in respect of the arrears due on its separate account. The proprietors of these shares in respect of which the separate accounts had been opened had dealt with them separately, and there have been transfers and other alienations of the shares as shares in respect of which separate accounts have been opened.

It is first argued in support of this appeal that the Subordinate Judge was in error in holding that the order of the Collector opening the separate account No. 5 in respect of the share on which the plaintiffs are part-purchasers could be questioned after the lapse of 35 years. No authority other than the Collector had power under the law to open a separate account and the law gave him full power to open an account. If in ordering that an account be opened he committed an error in law, that could not make his order bad for want of jurisdiction. In the case of *khata* No. 5 the record shows that the provisions of the law were fully complied with before the order was passed directing that the account be opened. The necessary notices were served, and no objection was taken by any one who would at the time have been interested in opposing the application. Nor was any appeal preferred against his decision to the higher

1911

MAHAMMAD MEHDI HASSAN KHAN v. SHEO-SHANKAR PERSHAD SINGH.

BRETT J.

revenue authorities, as might have been done. His order, therefore, became final.

Furthermore, if the order opening this separate account be now interfered with, the orders relating to all the other accounts would be equally open to question, with the result of disturbing rights long recognised and of creating uncertainty, confusion and hardship.

Undoubtedly the separate account has been opened, and has been in existence for 35 years. It is impossible now to treat it as though it had never had any existence; indeed the defendant No. 1's own decree is based on the existence of the separate account No. 1 against the share covered by which he is seeking to enforce his mortgage-decree. That share was in fact sold for its own arrears after the decree had been obtained by defendant No. 1.

Also it is argued that defendant No. 1 being the transferee by mortgage of the rights of some co-sharers in the estate, it is not open to him now to question the legality of an order of the Collector which his transferors accepted and have acquiesced in for 35 years. There was a remedy in the superior Revenue Courts when the Collector's order was passed, and that remedy never having been sought, and on the contrary the order having been acquiesced for 35 years, it cannot now be questioned and declared invalid by a Civil Court.

It is also contended that even accepting, though not admitting, that the separate account could not have been opened under the provisions of sections 10 and 11 of Act XI of 1859, still any defect would be covered by section 70 of Act VII (B.C.) of 1876, and section 71 of that Act which makes the provisions relating to sale included in sections 13 and 14 of Act XI of 1859 applicable to accounts opened under section 70 of Act VII (B.C.) of 1859, would also operate to bring the sharers in respect of whom the separate share had been opened within the exception provided by section 53 of Act XI of 1859.

It has also been suggested that defendant No. 1 is bound by the finding of the Court in the suit No. 51 of 1904 to which he was a party.

As to this last contention, we have only to observe that it has no weight. The suit was dismissed for other grounds, and the opinion expressed by the Judge was not necessary for the decision of that suit and so cannot bind the defendant.

The most important question is certainly whether after the lapse of 35 years a Civil Court can call into question the order of a Revenue Court, which order was originally passed with all the formalities required by the law, which was not appealed against and so became final as regards the parties affected by it and which has been acquiesced in by the persons

through whom the defendants, who now desire to dispute the order, claim title. In consequence of that order of the Collector and of other similar orders for the opening of separate accounts in respect of other shares in the same estate rights have been lost, sold or transferred, and to disturb the order after the lapse of so many years, would be to render uncertain titles long existing and to create confusion and hardship.

In my opinion the Collector certainly had jurisdiction to open the separate account. If at the time of opening the account he misunderstood the provisions of the law, that would not necessarily make his order void but voidable by the persons affected thereby. In the present instance none of the persons who were affected by the order have ever raised any objection to it, and the question is whether the defendant No. 1 as mortgagee of defendant No. 2, whose share in respect of which *khata* No. 1 was originally opened, has subsequently been sold, can be allowed to raise the objection in this suit.

In my opinion the order of the Collector, acquiesced in and acted on for 35 years, is not now open to question in a Civil Court; and if it were, the defendant No. 1 who derives his title through defendant No. 2 who acquiesed in the order all along, cannot be allowed in this suit to dispute the legality of the order.

The contention that the order is illegal depends entirely on the decision of this Court in the case of *Nunhoo Shahee* v. *Ram Pershad* (1). That decision was delivered on the 15th December 1873. The judgment states that plaintiff comes into Court upon a statutable cause of action, and that his suit must be dismissed unless he brings himself either within section 10 or section 11 of Act XI of 1859. Exactly what the cause of action was is not stated. Apparently he sued to have it declared that he had a right to have a separate account opened in respect of his share in the estate. As however he was only an 8-anna shareholder in four mouzahs out of the six which constituted the whole estate, it was held that he was not "a recorded sharer of a joint estate in common tenancy within section 10." It was further held that he could not come under section 11, because he was not a recorded sharer of a joint estate whose share consists of a specific portion of the land of the estate because he had only an undivided moiety of four mouzahs out of six. If he had been joined with his co-sharers in the four mouzahs, he might possibly have come before the Court with them as a party entitled to sue under section 11.

In the present case the original petition for opening a separate account was made by Ram Anugrah Singh, Rama Kanta Singh and Musammat Sarawan, who together, apparently as members of one family, held shares in

(1) (1873) 21 W. R. 38.

1911

MAHAMMAD MEHDI HASSAN KHAN v. SHEO-SHANKAR PERSHAD SINGH.

BRETT J.

all the mouzahs included in the estate. The name of Musammat Sarawan was withdrawn by order of the Collector on a report from an officer of his Court. In the judgment relied on, it is not stated what would be the effect if in a case like the present the defendants had shares in 15 out of 17 mouzahs and joined in their application those co-sharers who had shares in the other two mouzahs. Apparently the application would then have fulfilled the requirement of section 10 of Act XI of 1859. There is nothing to support the view that shares in a joint estate held in common tenancy must have equal shares in all mouzahs. Unequal shares in the different mouzahs might be consistent too with definite shares held in common in the whole estate.

There is no provision of the law, that I am aware of, which lays down that the shares of tenants in common must be equal, either in every one of several mouzahs making up the estate, or in the entire estate.

In these circumstances, it seems open to doubt whether, on the basis of the decision relied on, the original application for the opening of the separate account did not fulfil the requirements of the law.

I am unable to agree, therefore, in the view taken by the lower Court that the suit of the plaintiffs must fail, because they could not be regarded as sharers with whom the Collector under sections 10 and 11 of Act XI of 1859 had opened separate estates.

The question arises whether they are entitled to claim to come within exception provided by section 53 by reason of the fact that they are only fractional shareholders of the share in respect of which the separate account was opened. There is nothing in the section to restrict the operation of the section to sharers holding the entire interest in the share, and in these circumstances I see no reason to hold that they do not come within the exception.

The result of these findings is, that I hold that the plaintiffs are entitled to the relief claimed in this suit, that is to say, to have it declared that they purchased the estate No. 3143 free of all encumbrances. In these circumstances, I hold that they as assignees of defendant No. 7 are also entitled to recover from defendant No. 1 the sum of Rs. 1,454-8 which had been deposited by defendant No. 7 in order to obtain the injunction in this suit with interest at 6 per cent. per annum on that account up to the date of realization. I would accordingly set aside the judgment and decree of the lower Court, and grant the plaintiff a decree to the above effect. Plaintiffs are entitled to costs from defendant No. 1 in both the Courts.

As, however, my learned brother holds a different opinion, the appeal must be referred to the Hon'ble the Chief Justice under the provisions of section 98 of the Code of Civil Procedure, in order that it may be referred to a third Judge for hearing.

1911

MAHAMMAD MEHDI HASSAN KHAN v. SHEO-SHANKAR PERSHAD SINGH.

VINCENT J.

VINCENT J. [After stating the facts his Lordship continued :] The learned Subordinate Judge found that the plaintiffs were co-sharers in the mehal, and was therefore of opinion that their purchase was under section 53 of Act XI of 1859 subject to encumbrances, unless it is shown that they were sharers with whom the Collector had opened separate accounts under sections 10 and 11 of the Act. He further found that, although there was a separate account opened in the name of the predecessors in interest of plaintiffs in 1872 by the Collector for their share in this mehal nominally under section 10 of Act XI of 1859, yet that account was opened without jurisdiction, and that it could not therefore be said that the plaintiffs were persons with whom separate accounts had been opened under that section.

In this view of the facts the plaintiffs' suit was dismissed, and hence this appeal has been filed.

The only point argued in the appeal is whether the purchase by the plaintiffs through defendant No. 7 was a purchase free of encumbrances under section 53 of Act XI of 1859.

Now, the decision of the learned Subordinate Judge is based on the wording of section 10 of Act XI of 1859. That section enacts that a recorded sharer of a joint estate, held in common tenancy, if he desires to pay in his share of the revenue of the estate separately, may submit an application to the Collector to that effect : and the Collector may after notifying the facts in a particular manner after a period of six weeks, if no objections are made, open a separate account as desired. If any objection of any kind is raised by any other co-sharer, the Collector must at once refuse to take further action and refer the matter to the Civil Court under section 12.

Under section 53 of the same Act, if a co-sharer in an estate purchases the estate at a revenue sale, he acquires it subject to encumbrances, except in the case of sharers with whom the Collector has opened separate accounts under sections 10 and 11 of the Act.

The Subordinate Judge finds that the predecessors in interest of the plaintiffs were not in fact sharers in a joint estate held in common tenancy, because they owned shares in 14 or 15 mouzahs only out of the various villages, 18 in number, comprising the estate and were not interested in every village in the estate. The Subordinate Judge is of opinion in these circumstances that the Collector had no jurisdiction to open a separate account with the predecessor-in-interest of the plaintiffs under section 10 of Act XI of 1859, and that the plaintiffs cannot be accepted as co-sharers with whom the Collector had opened separate accounts under that section, there being no jurisdiction under that section, and that therefore their purchase was not free of, but subject to, encumbrances.

1911

MAHAMMAD MEHDI HASSAN KHAN v. SHEO-SHANKAR PERSHAD SINGH.

VINCENT J.

On appeal it is argued that the expression "estate held in common tenancy" has been misunderstood by the learned Subordinate Judge, that in any case the Collector had jurisdiction to open a separate account under section 10 and has done so, and that the order cannot be said to have been made without jurisdiction, and further, that as all the sharers in the estate, including the persons from whom the defendant derives title, made no objection at the time, and as the separate account was opened and accepted for 27 years before the sale, the validity of the order cannot now be questioned. It is further urged that in any case the separate account could have been opened under section 70 of Act VII (B.C.) 1876, and that it should be held to have been opened under that section if necessary, and that the effect then would be same as if it had been opened under section 10 of Act XI of 1859.

None of these arguments appear to me to be of very great weight. Section 53 of Act XI of 1859 lays down that if a sharer in an estate purchases the estate at a revenue sale, he does so subject to all encumbrances existing at the time of the sale, unless the purchasing co-sharer or sharers are persons with whom the Collector has opened separate accounts under sections 10 and 11 of the Act. Section 10 of the Act empowers a Collector to open separate accounts in joint estates held in common tenancy, on the application of a recorded co-sharer. If there is no joint estate held in common tenancy, then in my view of the law section 10 has no application, and the Collector has no jurisdiction to open separate account without jurisdiction, then it cannot be said that the separate account is one opened under section 10 of the Act. Before that section can apply at all, it is necessary that the estate should be one held in common tenancy, and if the estate is not so held, the section has no application. Now Mehal Raiputti is not an estate of that description. The expression "estate held in common tenancy" is defined in section 30 of Regulation XIX of 1814 as meaning an estate where all the sharers have a common right and interest in the whole of the estate. Where, therefore, various co-sharers have certain interests not in the whole estate but only in particular villages in that estate, it cannot be said that the estate is held in common tenancy; this view has also been accepted in this Court in the case of *Nunhoo Shahee* v. *Ram Pershad Narain Singh*. (1)

Mr. Justice Phear in that case says that the plaintiffs confessedly cannot bring himself under section 10 of Act XI, because by his own representation he is only an 8-anna shareholder in 4 mouzahs out of the six which constitute the whole estate, and he is therefore not "a recorded sharer of a joint estate held in common tenancy" within the meaning of section 10. The same view has been accepted by the revenue

(1) (1873) 21 W. R. 38.

authorities in the Board's Miscellaneous Proceeding No. 306, dated 21st September 1876, quoted at page 19 of the Revenue Sale Manual, where the Hon'ble Members of the Board of Revenue take the definition of an estate of this character as given in Regulation XIX as applicable to section 10 of Act XI of 1859, and states that a separate account cannot be opened under section 10 unless there is an estate held in common tenancy as set forth in section 30 of Regulation XIX of 1814.

Finally, in 1876, the Legislature recognised the difficulties that existed in regard to separate accounts in estates like the present one, and section 70 of that Act was enacted apparently to specifically provide for the opening of separate accounts in the case of proprietors who were recorded as owning an undivided interest held in common tenancy in any specific portion of the lands of an estate but not extending over the whole estate. If there previously had been any right to open separate accounts in such cases, there would have been no need for this change in the law.

In these circumstances, I hold that the separate account in this estate was improperly opened under section 10 of Act XI of 1859 in 1872, and that the Collector had no jurisdiction to open any such separate account in this estate, and it cannot be said, in my opinion, that any separate account opened by him was a separate account opened under the provisions of section 10 of Act XI of 1859, and the owner of any separate account open without jurisdiction is not in my opinion entitled to claim the benefit of section 53 of Act XI of 1859, which merely relates to the case of co-sharers with whom separate accounts have been opened under sections 10 and 11.

It is true that a separate account No. 5 was opened 27 years before the sale, and that the va'idity of the order of the Collector was not questioned, but this does not in my view of the law affect the case or give validity to an order which was made without jurisdiction. Nor can the defendants in the suit be prejudiced by any such act of the Collector.

It is then urged that as the account remained open after Act VII of 1876 was passed, it should be held to be a separate account under that section. I do not think, however, that this contention has any force. The separate account No. 5 was not opened under section 70 of Act VII (B. C.) of 1876 and does not purport to have been opened under that section, and further no notices were issued under that section to the sharers interested in the estate after the Act of 1876 was passed. Moreover, the privileges given under section 53, Act XI of 1859, to the owner of a separate account opened under sections 10 and 11 of that Act are not apparently extended to those who have opened separate accounts under section 70 of Act VII of 1876. Section 71 of the Act extends the provissions of sections 13 and 14 of

1911

MAHAMMAD MEHDI HASSAN KHAN v. SHEO-SHANKAR PERSHAD SINGH.

VINCENT J.

Act XI to separate accounts opened under Act VII of 1876, but it is at least open to doubt how far this section makes section 53 of Act XI apply to those who have opened separate accounts under the Land Registration Act.

In this view of the facts and the law, the plaintiff in this suit, who is a co-sharer in the estate of Raiputti and bought the estate at a revenue sale, not being a co-sharer, who has opened a separate account under section 10 or 11 of Act XI of 1859, purchased the estate subject to any encumbrance that there was on it, and he, therefore, bought the share mortgaged to the defendant subject to the lien created by that mortgage, and is not entitled to any relief in this case. In my opinion, therefore, the appeal should be dismissed with costs.

It is true that the defendant No. 7 had no right to withdraw the deposit of Rs. 1,454 before the sale of the mortgaged property was complete, and it was found that the sale-proceeds were not sufficient to liquidate his claim, but this amount would be in any case payable out of the mortgaged property, and the amount will no doubt be deducted from the mortgage dues when the decree is executed.

It seems, therefore, that it is unnecessary and would be improper for the Court to order a refund of the amount in the present suit.

Owing to this difference of opinion, the case was referred, under section 98, sub-section (*2*) of the Code of Civil Procedure (Act V of 1908), to Mookerjee J.

Dr. Sarat Chandra Basak (with him *Babu Shorashi Charan Mitra* and *Babu Harendra Krishna Mukherjee*), for the respondents, took a preliminary objection, that, under section 98, sub-section (*2*) of the new Code of Civil Procedure, the Hon'ble Judges should have formulated the question of law; under section 575 of the old Code the whole appeal could be referred, but under the new Code reference could only be made on a point of law.

Babu Umakali Mukherjee (with him *Moulavi Mahomed Mustafa Khan*), for the appellants. Question is, whether a separate account opened by the Collector in respect of an estate in the year 1872 was without jurisdiction, and therefore no separate account opened at all. Rightly or wrongly, separate account

had been opened for many years before the present suit was brought; revenue had all along been paid in respect of these shares into the separate accounts, and the shares in respect of which these separate accounts had been opened have been put up for sale each separately. I submit, the question of legality of opening separate accounts could not be raised now. The plaintiffs would be co-sharers of the villages to the extent they paid Government revenue, although they may not be owners of every inch of land covered by the estate; therefore section 10 of Act XI of 1859 is applicable. If that section is not applicable, section 11 is certainly applicable. Neither of these sections, if strictly construed, would apply; but these sections should be liberally construed. The case of *Nunhoo Shahee* v. *Ram Pershad Narain Singh* (1), relied on by the learned Subordinate Judge in his judgment, is distinguishable. In that case what the cause of action was is not exactly stated. Apparently the plaintiff sued for a declaration that he had a right to have a separate account opened in respect of a share in the estate. The plaintiff being only an 8-anna shareholder in some of the mouzahs of the estate, it was held that he was not a recorded sharer of a joint estate in common tenancy within the meaning of section 10 of Act XI of 1859. In the present case the original petition for opening separate account was made by persons who together apparently as members of one family held shares in all the mouzahs included in the estate. In any case, the separate account could have been opened under section 70 of the Land Registration Act, and it should be held to have been opened under that section, if necessary, and the effect then would be the same as if it had been opened under section 10 of Act XI of 1859. The opening of the separate account in

(1) (1873) 21 W. R. 38.

1911

MAHAMMAD MEHDI HASSAN KHAN v. SHEO-SHANKAR PERSHAD SINGH.

1872 by the Collector under section 10 of the Act could not be said to have been done without jurisdiction; the only suggestion which could be made was that he assumed jurisdiction in an irregular manner: *Gurdeo Singh* v. *Chandrikah Singh* (1). In the case of *Rai Mohan Saha* v. *Sashanka Mohan Ray* (2) the Hon'ble Judges declined to re-open the matter on account of there being a long delay. Under section 53 of Act XI of 1859 the plaintiffs purchased the property free of all encumbrances.

Dr. Sarat Chandra Basak, for the respondents. Even if sections 10 and 11 of Act XI of 1859 be liberally construed, the present case does not fall under either of these sections. The expression "estate held in common tenancy" means an estate where all the sharers have a common right and interest in the whole of the estate. It has been so defined in section 30 of Regulation XIX of 1814. The original applications made by the persons for opening of separate accounts could not come either under section 10 or section 11 of Act XI of 1859: see *Nanhoo Shahee* v. *Ram Pershad* (3). The Collector had no jurisdiction to open the separate account. The expression "sharers with whom Collector has opened separate account under sections 10 and 11" means sharers with whom the Collector has opened separate accounts acting in comformity with sections 10 and 11; inasmuch as the Collector did not do so, his action was without jurisdiction; and if it is without jurisdiction it can be challenged after any length of time: see *Golab Sao* v. *Chowdhury Madho Lal* (4) and *Abdulullah Sarkar* v. *Asraf Ali Mandal* (5).

Cur. adv. vult.

(1) (1907) I. L. R. 36 Calc. 193, 205.
(2) (1899) 12 C. L. J. 407.
(3) (1873) 21 W. R. 38.
(4) (1905) 2. C. L. J. 384.
(5) (1907) 7 C. L. J. 152, 166.

MOOKERJEE J. This is a reference under section 98, sub-section (*2*) of the Civil Procedure Code of 1908. The reference is not strictly in form, because the learned Judges have omitted to state specifically the point of law upon which they differed. The difference between section 575 of the Code of 1882 and section 98 of the Code of 1908 appears to have been overlooked. Under the former Code, it was the appeal that was referred to a third Judge when the Judges hearing the appeal differed in opinion on a point of law, and on such reference the whole appeal was open for argument and not merely the point of law on which the Judges had differed in opinion. Under the Code of 1908, the proper procedure is to state the point of law upon which the Judges differ; the appeal is then to be heard upon that point only, and what is to be decided is not the appeal but the point of law only. In the case before me, this procedure has not been followed; but the parties are agreed that there is only one point of of law involved in the appeal, upon which the learned Judges who heard the appeal in the first instance have differed, as is manifest from their recorded opinions. That point may be formulated as follows:

Is a proprietor who is not a recorded sharer of a joint estate held in joint tenancy within the meaning of section 10 of Act XI of 1859 nor a recorded sharer whose share consists of a specific portion of the lands of the estate within the meaning of section 11, but is recorded as proprietor of an undivided interest held in common tenancy of a specific portion of the lands of the estate, but not extending over the whole estate within the meaning of section 70 of the Bengal Land Registration Act, 1876, entitled to claim the benefit of the exception made in section 53 of Act XI of 1859 in favour of sharers with whom the Collector has under

1911

MAHAMMAD MEHDI HASSAN KHAN v. SHEO-SHANKAR PERSHAD SINGH.

MOOKERJEE J.

section 10 or section 11 of the Act opened separate accounts?

My learned brother Brett is of opinion that this question ought to be answered in the affirmative. My learned brother Vincent on the other hand is of opinion that the question ought to be answered in the negative. To determine which of these two conflicting views should prevail, the provisions of the Revenue Sale Law (Act XI of 1859) and of the Land Registration Act [Act VII of (1876) B.C.] must be examined.

It is necessary to premise at the outset that one of the proprietors of a joint estate may be in enjoyment of his interest therein in one of three ways; namely, *first*, he may be a recorded sharer of the whole joint-estate held in common tenancy; *secondly*, he may be a recorded sharer of the joint estate and his share may consist of a specific portion of the land of the estate; or, *thirdly*, he may be recorded as proprietor of an undivided interest held in common tenancy in a specific portion of the land of the estate, but not extending over the whole estate. If his interest is of the first description, he may apply to have his share separated and a separate account opened under section 10 of Act XI of 1859. If his interest is of the second description, he may have his share separated and a separate account opened under section 11 of Act XI of 1859. If his interest is of the third description, he may have his share separated and a separate account opened under section 70 of the Land Registration Act. In this connection, it is important to bear in mind that under section 71 of the Land Registration Act, section 12 of Act XI of 1859 is made applicable to an application under section 70, and it is further provided that the effect and consequences of opening a separate account under section 70 shall be such and the same as are described

in sections 13 and 14 of Act XI of 1859. It is manifest, therefore, that the consequences of the opening of a separate account in cases covered by section 70 (that is, where the applicant is proprietor of an undivided interest held in common tenancy in a specific portion of the land of the estate, but not extending over the whole estate) are assimilated to the consequences of opening a separate account under section 10 or section 11 of Act XI of 1859, only in so far as sections 13 and 14 are concerned, that is, only in respect of the sale of the separated share and of the entire estate under certain specified conditions. Now, when we turn to section 53 of Act XI of 1859, we find that it defines the right of a purchaser at a revenue sale who is a recorded or unrecorded proprietor or co-partner. Such person, whether he purchases the property at a revenue sale or acquires it by re-purchase from the purchaser, acquires the estate, to put the matter briefly, subject to all its encumbrances existing at the time of the sale. An exception, however, is made in favour of sharers with whom the Collector has opened separate accounts under sections 10 and 11 of the Statute; they stand in a position of advantage which is denied to the purchaser co-partner who has not opened a separate account under either of these sections. I am not concerned with the policy of the Legislature in this respect, but it is remarkable that the privilege is not extended to persons who have opened separate accounts under section 70 of the Land Registration Act. Section 71, as I have just observed, makes sections 13 and 14, but not section 53, of Act XI of 1859 applicable to the proprietor who has obtained a separate account opened under section 70. The inference is irresistible that the co-partner, whose interest is of the description

1911

MAHAMMAD MEHDI HASSAN KHAN v. SHEO-SHANKAR PERSHAD SINGH.

MOOKERJEE J.

mentioned in section 70 and whose separate account has been opened under that section, can purchase the estate at a revenue sale, only as subject to encumbrances. The question then arises, does it make any real difference if a separate account, which could not be opened under section 10 or section 11 of Act XI of 1859, because the interest of the proprietor was not of either of the two descriptions mentioned in these sections, has been opened by the Collector without any jurisdiction. In my opinion, it makes no difference whatsoever. The position of the proprietor who has obtained a separate account so opened, in contravention of section 10 or section 11, is not identical for purposes of section 53 with the position of the proprietor whose separate account has been properly opened. The expression "sharers with whom the Collector has opened separate accounts under sections 10 and 11" plainly means "sharers with whom the Collector has opened separate accounts acting in conformity with sections 10 and 11." To accept any other interpretation would be to acquiesce in a fraud on the Statute. The Collector when he opens a separate account under section 10 or 11 performs a statutory duty; his act must be in strict conformity with the legislative provisions on the subject. If the Collector opens a separate account in clear contravention of the provisions of section 10 and section 11, in fact, if the Collector applies the provisions to cases to which the Legislature never intended that they should be applied, his act is without jurisdiction and cannot confer upon the person who obtains a separate account opened under such circumstances the statutory privilege created by section 53. If an authority is needed in support of the proposition that where jurisdiction is usurped in contravention of statutory provisions, the act performed is a nullity, reference may be made to

the decisions of the Judicial Committee in *Ledgard* v. *Bull* (1), *Minakshi* v. *Subramanya* (2), *Fischer* v. *Secretary of State* (3), and of this Court in *Achhamian* v. *Durga Churn Law* (4), *Golab Sao* v. *Chowdhury Madho Lal* (5), *Gurdeo Singh* v. *Chandrikah Singh* (6), and *Ananda Kishore* v. *Daiie* (7). In my opinion, the view adopted by Mr. Justice Vincent is correct, and I entirely agree in his conclusion that the question of law formulated above must be answered in the negative. This view is in accordance with that taken in the case of *Nunho Shahee* v. *Ram Pershad*(8), which, so far as I have been able to discover, has never been doubted in this Court. I observe that with reference to this decision, my learned brother Brett remarks that the judgment does not state what the cause of action was. I have accordingly examined the records of that case. It appears that an estate Chilowley consisted of six villages. The plaintiffs were interested in a one-half share of four only of the six villages. They applied to the Collector to open a separate account for the half share of the four villages. Upon objection of the defendants co-proprietors, the application was refused by the Collector on the 17th April 1871. On the 15th May following, the plaintiffs sued for declaration of title and for separation of the Government revenue of their share of the four villages. The first Court held that the suit was maintainable under section 12 of Act XI of 1859 and made a decree in favour of the plaintiffs, though the revenue assigned was calculated on a basis

(1) (1886) I. L. R. 9 All. 191 ; L. R. 13 I. A. 134.
(2) (1887) I. L. R. 11 Mad. 26 ; L. R. 14 I. A. 160.
(3) (1898) I. L. R. 22 Mad. 270 ; L. R. 26 I. A. 16.
(4) (1897) I. L. R. 25 Calc. 146.
(5) (1905) 2 C. L. J. 384.
(6) (1907) I. L. R. 36 Calc. 193 ; 5 C. L. J. 611.
(7) (1909) I. L. R. 36 Calc. 726 ; 10 C. L. J. 189.
(8) (1873) 21 W. R. 38.

1911

MAHAMMAD MEHDI HASSAN KHAN v. SHEO-SHANKAR PERSHAD SINGH.

MOOKERJEE J.

other than that suggested by the plaintiffs. Upon appeal by the plaintiffs, the decree of the Subordinate Judge was affirmed by the District Judge. Upon second appeal to this Court by the plaintiffs (which related to the amount of revenue assignable in respect of the half share of the four villages), it appears to have been argued by the defendants-respondents (by way of cross-objection, though a memorandum of cross-objection is not to be traced on the part of the record still in existence), that the suit was not maintainable under section 12 of Act XI of 1859, as the plaintiffs were not entitled to have a separate account opened under either section 10 or section 11. Phear and Morris JJ. gave effect to this contention and dismissed the suit. The learned Judges held that, as the plaintiffs were shareholders in some only of the villages constituting the estate, they could not claim to have a separate account opened under either section 10 or section 11. It is superfluous to add that upon a plain reading of the sections no other conclusion was possible.

Let me now consider the effect of this view of the law upon the present question. The records of the Collector which have been called for, upon the joint application of both the parties, show conclusively that, not merely the fifth separate account, the proprietor of which purchased this estate at the revenue sale held on the 6th June 1899, but all the fifteen separate accounts had been opened during the years 1871—1874 in contravention of the provisions of sections 10 and 11 of Act XI of 1859: the applicants were neither sharers in the whole estate nor proprietors of specific lands, but they were shareholders in some only of the many villages comprised in the entire estate, as is clearly shown by the details of the shares and villages in respect of which the separate accounts

were opened. This state of things has continued for many years, and has not been questioned by the various proprietors. The reason is obvious. When the Land Registration Act of 1876 came into force, it became clear that what had been done before irregularly, because not falling within the scope of sections 10 and 11 of Act XI of 1859, might be validly done under section 70 of the Land Registration Act. It would have been idle, therefore, for the parties to challenge the validity of the separate accounts at any time after 1875. If objection had been taken by any of the proprietors, the then existing arrangements might have been validated by the presentation of applications under section 70 of the Land Registration Act. It is not right to say that the parties now attempt to invalidate what had been done at their instance during the years 1872-74, and no such question arises as was considered by this Court in *Rai Mohan Saha* v. *Sashanka Mohan Roy* (1), namely, the right of a proprietor to question the validity of a settlement of an estate irregularly made. If we look at the substance of the matter, the position of the parties is identical with what would have been their position if the separate accounts had been, as they could have been, opened under section 70 of the Land Registration Act. There is no controversy that if they be deemed to have been opened under section 70 of the Land Registration Act, the purchaser at the revenue sale is not entitled to claim the benefit of the exception in section 53 of Act XI of 1859. The conclusion follows that the view adopted by Mr. Justice Vincent, in concurrence with the Court of First Instance that the purchaser has acquired the property subject to encumbrances, is correct, and must be upheld.

(1) (1899) 12 C. L. J. 407.

1911

MAHAMMAD MEHDI HASSAN KHAN v. SHEO-SHANKAR PERSHAD SINGH.

MOOKERJEE J.

It is satisfactory to find that this view of the law is manifestly in accord with the justice of the case. We have some indication of the value of the property, when we remember that the mortgagees advanced more than Rs. 13,000 on security of the share of the villages comprised in the first separate account which may be assumed to be worth at least that sum. The value of that share, as shown by the proportion of the total Government revenue assigned to it, is about one-sixth of the value of the entire estate. The whole estate, therefore, is worth at a very moderate estimate at least Rs. 78,000. The purchaser has acquired it for Rs. 16,200; the charge claimed by the mortgagees amounts approximately to Rs. 20,000; even if the purchaser has to pay this charge, as, in concurrence with Mr. Justice Vincent, I hold that he is bound to do, he has made an excellent bargain. In fact, the very small price paid by the purchaser indicates plainly that he, at any rate, must have thought that he was acquiring the property subject to encumbrances.

The result, therefore, is that in concurrence with Mr. Justice Vincent I hold that the decree of the Subordinate Judge must be affirmed, and this appeal dismissed with costs.

S. C. G. *Appeal dismissed.*

CRIMINAL REVISION.

Before Mr. Justice N. R. Chatterjea.

KHERODE CHANDRA ROY CHOWDHURY

v.

EMPEROR.*

1911

Nov. 17.

Obscene publication—Religious poem of spiritual and allegorical character based on an incident narrated in a sacred book of great antiquity and dealing with the acts of divine beings—Work not calculated to deprave or corrupt morals—Penal Code (Act XLV of 1860), s. 292—Finding of fact.

The test of obscenity is whether the tendency of the matter charged as obscene is to deprave and corrupt those whose minds are open to such immoral influences and into whose hands such a publication might fall. If in fact the work is one which would certainly suggest to the minds of the young of either sex, or even to persons of more advanced years, thoughts of a most impure and libidinous character, its publication is an offence, though the accused has in view an ulterior object which is innocent or even laudable.

Reg. v. *Hicklin* (1), *Steele* v. *Brannan* (2), *Queen-Empress* v. *Parashram Yeshvant* (3), *Emperor* v. *Hari Singh* (4), *Empress* v. *Indarman* (5) followed.

A religious or classical work does not become obscene, within s. 292 of the Penal Code, simply on account of its containing some objectionable passages, because the tendency of such publications is not to deprave or corrupt morals.

If objectionable passages in a religious book are extracted and printed separately, and they deal with matters which are to be judged by the standard of human conduct, as where they relate to immoral acts of human beings, and the tendency of such publication is to deprave and corrupt those whose minds are open to immoral influences, the publication may not be justified, though the passages form part of a religious book.

* Criminal Revision No. 945 of 1911, against the order of Braja Durlabh Hazra, Deputy Magistrate of Cuttack, dated May 13, 1911.

(1) (1868) L. R. 3 Q. B. 360, 371.
(2) (1872) L. R. 7 C. P. 261.
(3) (1895) I. L. R. 20 Bom. 193.
(4) (1905) I. L. R. 28 All. 100.
(5) (1881) I. L. R. 3 All. 837, 843.

1911

KHERODE CHANDRA ROY CHOWDHURY v. EMPEROR.

Where, however, a story which appears objectionable is taken from a religious book and printed separately, but it relates to beings whose conduct is not to be judged by the standard of human beings, it is not an obscene publication, as it would not, on account of its religious character, raise immoral thoughts in the minds of persons who believe in the divinity of beings whose acts and conduct are described in the story.

Where a poem was published in the Uriya language containing a story, complete in itself so far as it goes, of the dalliances of Radha and Krishna, who were described as divine personages and their acts as supernatural, the latter being represented to be a boy of five, taken from the Uriya *Haribans*, a very sacred book of the Uriyas, the incident and sentiments being the same as, and the language not more objectionable than, that of the original, and it was in itself an old religious book of a spiritual and allegorical character, which had often been published and registered without exception taken, and which was apparently intended for Hindus who form the vast majority of the Uriyas and believe in the divinity of Radha and Krishna, and do not consider their doings as immoral :—

Held, that the publication was not obscene within the meaning of s. 292 of the Penal Code.

THE petitioner, who was the proprietor of the Star Press at Cuttack, was tried before Babu Braja Durlabh Hazra, Deputy Magistrate of Cuttack, and convicted under s. 292 of the Penal Code, on the 13th May 1911, for having published an alleged obscene work called the *Natu Chori*, or the "Theft of tops," and fined Rs. 50. The work is a poem, in booklet form, printed in the Uriya language, and contains 28 stanzas ending with a Sanskrit sloka, purporting to be the composition of Dina Sundari, an Uriya poetess. It deals with an incident which, so far as it goes, is complete in itself, in the lives of Radha and Krishna, and is borrowed from the Uriya *Haribans*, a sacred book of the Uriyas, though it is not mentioned in the original Sanskrit *Haribans*. The poem is not an extract of certain passages from the Uriya *Haribans*, but the story and sentiments are the same, though the language is the author's own and differs from that of the original. Radha and Krishna, the latter of whom is

represented as a boy of five, are both described as divine personages whose acts are supernatural, and the story was alleged to have a spiritual and allegorical meaning. The poem was stated to have existed in palm-leaf manuscript for a 100 years. It passed through several editions in print and was registered 15 or 20 times without objection taken, and appeared in the Bengal Library Catalogue of Books in the *Calcutta Gazette* as a mythological publication. It appeared from Hunter's Statistical Accounts of Bengal, Volumes XVIII and XIX, that 95 or 96 per cent. of the district population of Cuttack, Balasore and Puri are Hindus, and the vast majority of them worshippers of Vishnu.

Against the order of the Magistrate an application in revision was filed before the Sessions Judge of Cuttack, who rejected the same on the 15th June. The petitioner then moved the High Court and obtained the present Rule.

Sept. 12.

Mr. B. C. Mitter (*Officiating Advocate-General*), for the Crown. The High Court ought not to go into the merits and interfere with the finding of the lower Court, arrived at in a summary trial, that the booklet was obscene. The principle on which the obscenity of a publication is to be determined has been laid down in several decisions and text books: *Queen* v. *Hicklin* (1), *Queen-Empress* v. *Parashram Yeshvant* (2), *Emperor* v. *Hari Singh* (3), Mayne's Criminal Law, 3rd ed., p. 143; Russell on Crimes, Vol. II, pp. 876, 878 (2nd Ed.). Though the Uriya *Haribans* may be a recognized religious work, the *Natu Chori* is not. Section 296 of the Penal Code does not protect a book like this containing obscene passages extracted and dissociated from the original and printed *separately*.

(1) (1868) L. R. 3 Q. B. 360. (2) (1895) I. L. R. 20 Bom. 193.
(3) (1905) I. L. R. 28 All. 100.

1911

KHERODE CHANDRA ROY CHOWDHURY v. EMPEROR.

The offence is aggravated by the cheapness of its price (2 pice per copy).

Mr. S. Roy (with him *Babu Suresh Chunder Chuckerbutty*), for the petitioner. The summary trial in the present case was improper, and the Court should have gone into the facts. The booklet in question gives a complete story of an incident in the lives of Krishna and Radha, and is not an extract of obscene passages only, published in a separate form. The story is found in the Uriya *Haribans*, a sacred book of the Uriyas. Its language is not more objectionable than that of the original. The whole story has a deep allegorical and spiritual meaning. Krishna is described as a boy of five, incapable of physical immorality, and is treated as a divine being performing supernatural acts. By the Vaishnabs Krishna is regarded as the supreme soul, and Radha the human soul, and their dalliance is an allegorical representation of the supreme with the human soul. (Explains further.) Such objectionable passages are found in many classical works such as the *Srimat Bhagbat*, the *Gita Gobinda*, and the *Mahabharata*. The *Natu Chori*, being only a narrative of a *lila* or mysterious deed of the divine Krishna and Radha, must be regarded as a work outside the scope of section 292 of the Penal Code. It cannot inspire evil thoughts in the minds of the vast majority of the Vaishnabs. It existed in palm-leaf manuscript for a century, and passed through several editions, and was published 15 or 20 times before without any objection being taken. It is also noted in the *Calcutta Gazette* as a mythological publication. The majority of the witnesses have declared that it is a religious book, and that it would be a sacrilege to call it an obscene publication.

Cur. adv. vult.

N. R. CHATTERJEA J. The petitioner has been convicted by the Deputy Magistrate of Cuttack under section 292 of the Indian Penal Code for having printed for sale an obscene book called the *Natu Chori*, or the "Theft of tops," and sentenced to pay a fine of Rs. 50.

The book, or rather booklet, consists of seven small pages, and purports to be the composition of one Dina Sundari, said to be an Uriya poetess. It purports to deal with an incident in the lives of Radha and Krishna taken from the Uriya *Haribans*, a sacred book of the Uriyas. It passed through several editions in print, and is said to have been in palm-leaf manuscript for about a hundred years. It was registered 15 or 20 times previously without objection, and appeared in the Bengal Library Catalogue of Books in the *Calcutta Gazette* as a mythological publication. It was printed in the Star Press, of which the petitioner is the proprietor.

The plea of the accused was that the book is not obscene within the meaning of section 292 of the Indian Penal Code, and that he is not guilty. He was tried summarily by the Deputy Magistrate of Cuttack, who, however, recorded the evidence in full. The learned Deputy Magistrate held that the book was obscene and convicted and sentenced him as stated above. A Rule was granted by this Court to show cause why the conviction and sentence should not be set aside on the ground that the publication complained of is a recognized religious work which has been published in its present form for the last hundred years, and it, therefore, does not fall within the meaning of section 292 of the Indian Penal Code.

The Officiating Advocate-General, who appeared to show cause on behalf of the Crown, has contended in the first place that the finding of the learned Deputy

1911

KHERODE CHANDRA ROY CHOWDHURY v. EMPEROR.

CHATTERJEA J.

Magistrate that the book is obscene is a finding of fact, and that this Court should not, therefore, interfere. The learned counsel for the petitioner on the other hand strongly urged that, as a question of considerable importance was involved in the case, the Court should look into the facts. Having regard to the importance of the case, counsel on both sides were allowed to argue the case on the merits.

The principles upon which the obscenity of a publication are to be determined are well established. In the leading case of *Reg.* v. *Hicklin* (1), Cockburn C.J. stated: "The test of obscenity is this, whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences and into whose hands such a publication might fall." If in fact the work was one of which it was certain that it would suggest to the minds of the young of either sex, or even to persons of more advanced years, thoughts of a most impure and libidinous character then its sale was a criminal offence, and it was immaterial that the defendant had in view an ulterior object which was innocent or even laudable: see also *Steele* v. *Brannan*(2) The principles laid down in the above cases have been followed in this country in several cases: see *Queen-Empress* v. *Parashram Yeshvant* (3); *Empress* v. *Indarman* (4); *Emperor* v. *Hari Singh* (5).

These principles are not disputed on behalf of the petitioner and cannot be disputed, but what is contended on his behalf is that the publication is a religious work, that the incident is taken from the *Haribans*, a sacred work among the Uriyas, and deals with a love story of Radha and Krishna which

(1) (1868) L. R. 3 Q. B. 360, 371. (3) (1895) I. L. R. 20 Bom. 193.
(2) (1872) L. R. 7 C. P. 261. (4) (1881) I. L. R. 3 All. 837, 843.
(5) (1905) I. L. R. 28 All. 100.

has a deep allegorical meaning, and which it is a sacrilege to call obscene, that similar passages occur in various other religious works of the Vaishnabs such as the *Srimat Bhagbat*, the *Gita Govinda*, and in many classical works in Sanskrit, Bengali and Uriya. The learned counsel for the Crown contended on the other hand that, though a religious or classical work is not obscene merely because it contains some obscene passages, and although the *Haribans* may be a sacred book with the Uriyas, the publication of some obscene passages from such a book, divested from the book itself, cannot be justified, and would fall within the purview of section 292 of the Indian Penal Code. It was contended that the *Natu Chori* was not itself a recognised religious work, and though there might be objectionable passages in the *Haribans*, there is no reason why the obscenity of it should be brought out in an aggravated form in a cheap work (priced at 2 pice only), where only a few passages had been extracted dissociated from their context for the delectation of those people whose state of mind was such as would easily fall prey to depraved and corrupt thoughts contained therein.

The defence did not examine any witnesses, but cross-examined the prosecution witnesses, and put in certain books in evidence, such as the *Gita Govinda* (in Uriya), the Sanskrit *Gita Govinda* in Bengali character, the *Raghuvansa*, the Bible, the Uriya *Haribans* and several other editions of the *Natu Chori*. Some of the books and certain passages in others were marked exhibits. The publication in question is a poem in the Uriya language consisting of 28 stanzas, and ends with a Sanskrit sloka. The incident described in the book is borrowed from the Uriya *Haribans*, but the book is not an extract of certain passages from the *Haribans*. The incident, so

1911

KHERODE CHANDRA ROY CHOWDHURY v. EMPEROR.

CHATTERJEA J.

far as it goes, is complete in itself. The language of the book is the author's own and differs from that of the Uriya *Haribans*, but the story and the sentiments are the same. The original *Haribans* in Sanskrit was not produced in evidence, and I have not been able to find the story in the Sanskrit *Haribans*. But one of the witnesses for the presecution, Narain Prasad Mahanti, Deputy Inspector of Schools, says that the story of *Natu Chori* will be found in Vaishnab literature, and that he has read it elsewhere. Whatever that may be, it is certainly contained in the Uriya *Haribans* which is on the record, and which, the evidence for the prosecution shows, is a very sacred work of the Uriya Hindus. English translations of the *Natu Chori* and of the portion of the Uriya *Haribans* dealing with the incident (together with the Uriya poem in Bengali character) were furnished to the Court and to the counsel for the Crown, on behalf of the petitioner. The translation was not objected to (except as to the meaning of the word *rati* with which I will deal later on) by the learned counsel for the Crown who admitted that the language in which the story is described in the *Haribans* is as objectionable as that of the *Natu Chori*.

The objectionable passages are contained in stanzas 6 to 11, where Krishna is described as touching the left breast of Radha and asking her questions about it, and also asking Radha for caresses and for *rati*, and in stanzas 23 to 26 where Radha is described as removing the cloth from her breast when two tops and string miraculously dropped to the ground and Krishna looked at her breast. The word *rati* was held by the learned Deputy Magistrate to mean "carnal intercourse." Exception was taken to the above by counsel on behalf of the petitioner who

translated it as "love," and who contended that *rati* means "spiritual union' in the love stories of Radha and Krishna. The word *rati* in the love stories of Radha and Krishna is, no doubt, used in a spiritual sense, but in the ordinary acceptation of the word it means "carnal intercourse," and I think it may be so understood by ordinary people. The story, however, as related in the book shows that it could not relate to human beings. In the Uriya *Haribans* as also in the *Natu Chori*, Krishna is described as a boy of five years of age. He is described in the objectionable passages themselves as *Jagannath* (Lord of the World), *Achyuta* (the unfallen), *Pitabas* (the yellow-robed), *Deb Murari* (God Murari), all being names of the divine Krishna. There can be no doubt (and the witnesses for the prosecution admit) that the dropping of the tops and string out of nothing when Radha's cloth was shaken are supernatural acts, and a boy of five years can have no carnal knowledge. These go to show that it was not a description of Radha and Krishna as human beings and must have a spiritual meaning.

The love stories and dalliances of Radha and Krishna have a deep allegorical meaning. Madhusudan Rao, a retired Inspector of Schools, and a witness for the prosecution, says: "Krishna is an incarnation of the supreme soul and Radha is the human soul, and their dalliance is an allegorical representation of the dealings of the supreme soul with the human soul, *i.e.*, 'God's quest of man.' Ayan Ghose, the hushand of Radha, is a representation of the world trying to tie the human soul to it. *Bansi* (pipe) is inspiration." But I do not think the deep allegory and the spiritual significance of the love stories of Radha and Krishna can be fully understood by persons who have not a certain degree of spiritual culture. But the Hindus

1911

KHERODE CHANDRA ROY CHOWDHURY v. EMPEROR.

CHATTERJEA J.

generally, and the Vaishnabs in particular, do not look upon Radha and Krishna as human beings and do not judge their doings by the standard of human conduct or as in any way improper. They are worshipped as deities. Even a school boy or an ignorant Hindu, who has neither the learning nor the spiritual culture for appreciating the esoteric meaning of the *lilas* (mysterious deeds) of Radha and Krishna, would look upon them as divine persons, and all the incidents in their lives, including the amorous incidents, as divine, and the latter would not, therefore, raise impure thoughts in the minds of Hindus who believe in the divinity of Radha and Krishna. Hindus from their infancy see Radha and Krishna worshipped in temples, and some have the images of Radha and Krishna in their own houses, and they learn to look upon Radha and Krishna as deities from their infancy.

Eight witnesses were examined for the prosecution, of whom one is a formal witness. Of the remaining seven witnesses, one is a Christian, another a Mahomedan and the rest are Hindus. The evidence of the witnesses is generally to the effect that there are passages in the book which are obscene or offensive to purity and decency, that a perusal of the book may produce impure thoughts in the minds of readers, and that school boys ought not to read the book; but it also appears from their evidence (though I do not think any evidence is necessary on the point) that Krishna and Radha are believed by Hindus to be a god and goddess, that their doings are not considered as improper, and that those who believe in their divinity would not take immoral ideas from a story such as is described in the book. The Hon'ble Mr. M. S. Dass, a Christian gentleman and Uriya by birth, and a vakil of 30 years' standing, in cross-examination, says that he

knows Krishna is believed by a large sect of Hindus to be the incarnation of God, that the author of *Natu Chori* professes to describe one of the *balya lilas* of Krishna. He also says: "Those who believe Krishna to be a God and consider incidents like those described in the *Natu Chori* or *Haribans* for divine achievements, would not take immoral ideas from them." Girish Chandra Bhattacharjee, a Bengali domiciled in Orissa, and Head-clerk of the Registration Office, says in cross-examination that he regards Krishna and Radha as a god and goddess and the story about them as mythological, and that Hindus never consider the doings of Krishna and Radha as improper. He says that he would have never refused to pass the book for registration on the ground of its being obscene, and that he calls the book obscene only because he cannot read it before his mother and other elder superiors, and has no other reason to call it obscene. Madhu Sudan Rao, a retired Inspector of Schools, says that if the book is claimed to be a religious book, he cannot deny that, that for religious people, of whose creed the love of Radha and Krishna is a part, he does not consider it objectionable. He says he has read similar thoughts in other works; that the obscene passages in the *Gita Govinda*, which is considered by the Vaishnabs to be a religious book, are not considered by some classes of Hindus to be depraving to morals. He says Krishna is believed by Hindus as an incarnation of Vishnu, and Radha as that of Lakshmi, and that his own idea of purity is different from that of ordinary Hindus. Narain Prasad Mahanti, B.A., Deputy Inspector of Schools, says that the *Natu Chori* is a religious book treating of Radha and Krishna, that the *Haribans* is a very sacred work, and that if the *Natu Chori* was in the *Haribans* it would be a religious work, and

1911

KHERODE CHANDRA ROY CHOWDHURY v. EMPEROR.

CHATTERJEA J.

that there are many passages in Sanskrit or other classical works which are obscene.

Govind Rath (who was, however, declared hostile by the prosecution) says that such books are never considered to be offensive to morality. Purusattam Tarkalankar considers the *Natu Chori* as obscene, but does not consider the *Bastraharan* in the *Bhagbat* as obscene. But the *Bastraharan* is not obscene, only if it is looked at from the spiritual point of view. The Mohamedan witness, Abdul Samad's idea is that Radhika was "the illegal wife of Krishna," and that she was "a married woman who eloped with Krishna." Considering Krishna and Radha as man and woman, and ignoring the fact that Krishna is described as a boy of five years of age, as a divine person and as performing supernatural acts, the incident described in the *Natu Chori* may be called obscene, but Hindus generally, and Vaishnabs in particular, do not consider Radha and Krishna as human beings or any of their doings immoral.

There are many religious or classical works which contain objectionable passages. The Hon'ble Mr. M. S. Dass says: "I have read in books more obscene passages than those in the *Natu Chori*. In the Bible there are records of facts of incest having been committed. This exhibit L (Bible, Genesis, Chapter XIX, paragraphs 31-38) is an invitation to a sister to have sexual intercourse with a father. This is very obscene. This passage by itself would suggest immoral thoughts to people other than Christians who are immorally inclined."

No one would, of course, think of condemning a religious book because it contains some objectionable passages, and the reason why religious or classical works are not condemned on that ground are well understood. The Exception to section 292 of the

Indian Penal Code appears not to apply to religious books. The Exception runs as follows: "This section does not extend to any representation, sculptured, painted or otherwise represented, on or in any temple, or on any car used for the conveyance of idols, or kept or used for any religious purpose." But I think the reason why religious books are not included in the Exception is that the tendency of a religious publication is not to deprave or corrupt the morals of persons, and, therefore, a religious work is not obscene within the meaning of section 292. But if the objectionable passages contained in a religious book are extracted and printed separately, and such passages deal with matters which are to be judged by the standard of human conduct, for instance, where they relate to immoral acts of human beings, and the tendency of such publication is to deprave and corrupt those whose minds are open to immoral influences, such publication may not be justified on the ground that the passages formed part of a religious book. Where, however, a story, which looks objectionable, is taken from a religious book and printed separately, but it relates to beings whose conduct is not to be judged by the standard of human conduct, it cannot be condemned as obscene, because being looked upon as sacred, they would not raise immoral thoughts in people who believe in the divinity of the beings whose acts and conduct are described in such a story. The *Bastraharan* incident in the *Srimat Bhagbat*, the most sacred book of the Vaishnabs, when not looked at from the spiritual point of view, may be considered objectionable by people who do not believe in the divinity of Krishna or do not understand the spiritual significance of it. The same observations would apply to passages in the *Gita Govinda* and other works of Vaishnab literature. But they cannot

1911

KHERODE CHANDRA ROY CHOWDHURY v. EMPEROR.

CHATTERJEA J.

be called obscene because they are descriptive of the doings of persons considered divine and would not raise immoral thoughts.

As I have already pointed out, the *Natu Chori* is not an extract of certain isolated passages from the *Haribans*. It is a complete story in itself so far as it goes. It will be obvious to a Hindu that the book describes one of the *balya lilas* of the god Krishna (mysterious deeds of the infant Krishna). It would not raise immoral thoughts in them because they believe in their divinity and consider their doings sacred.

The book is in the Uriya language. The vast majority of the Uriyas are Hindus, who believe in the divinity of Krishna and Radha. It appears from Hunter's Statistical Account of Bengal, Vols. XVIII and XIX, that 95 or 96 per cent. of the district population of Cuttack, Balasore and Puri are Hindus, and vast majority of them are Vishnu worshippers.

But then it was contended that even if the *Natu Chori* may be considered as a religious book and may not be considered as immoral or obscene by the Hindus, there are non-Hindus, Christians for example, among Uriyas who might read the book and take immoral ideas from it. But the book is a religious one as some of the witnesses for the prosecution say. It is apparently intended for Hindus, and describes incidents which are not considered improper by the Hindus, who form the vast majority of the Uriya population. Under these circumstances, I do not think the book can be condemned as obscene merely because a small section of the Uriyas, who do not believe in the divinity of Radha and Krishna, might take immoral ideas from it. Besides, it will be obvious even to a non-Hindu on a perusal of the book that it purports to deal with the amours of the infant Krishna who is

described as a divine person and as performing some supernatural acts as shown by the miraculous dropping of the tops and string out of nothing.

From the evidence it appears that the *Natu Chori* was formerly in palm-leaf manuscript. Madhu Sudan Rao, a retired Inspector of Schools, says he understands that the book was about 100 years in palm-leaf. In cross-examination he stated he heard from Pandit Govind Rath that the book was in palm-leaf. Witness Govind Rath says that the book is an old work, like those of Upendra Bhanja (who is stated to have written three hundred years ago), and was formerly in palm-leaf, and the District Registrar, Abdul Samad, says that it is an old work published very often. This witness says that he has to register every book published in Cuttack before it is notified in the *Calcutta Gazette*, that he does not register a book if it is obscene, and he has to see if it is obscene before registering a book. He admits that he might have registered this book 15 or 20 times, but says that he does not read a book before registering it, that his clerk does so, and that he read the book in question for the first time when it was sent to him by the District Magistrate. The witness, Narain Prosad Mahanti, Deputy Inspector of Schools, says that he read an edition of the book 10 or 12 years ago. The book is described in the Bengal Library Catalogue of Books as a mythological poem. It also appears from the *Calcutta Gazette* that several editions of the *Natu Chori* printed in other presses are described as a mythological poem.

Though the mere fact that no notice was taken of other editions of the book or that the book is described in the *Calcutta Gazette* as a mythological poem would not justify its publication if it is really obscene, the fact remains that it was recognised as a mythological

1911

KHERODE CHANDRA ROY CHOWDHURY v. EMPEROR.

CHATTERJEA J.

poem, and was never objected to before the present prosecution.

The question raised in this case does not appear to have been raised in any case before. Having regard, however, to the facts appearing on the record, *viz.*—

(*i*) that the Uriya *Haribans* is a very sacred work of the Uriyas,

(*ii*) that the story as related in the *Natu Chori* is the same as that in the Uriya *Haribans*, and the language used in the former is not more objectionable than that used in the latter,

(*iii*) that the *Natu Chori* is an old work published very often,

(*iv*) that it is a religious work,

(*v*) that the Hindus believe in the divinity of Radha and Krishna, and do not consider their doings as improper, and that the incident described in the book would not suggest immoral thoughts in those who believe in their divinity,

(*vi*) that Vaishnabism is the prevailing religion of the Uriyas, and

(*vii*) that in the *Natu Chori* Krishna is described as a boy of five years of age, as a divine person and as performing supernatural acts,

I do not think it can be said that the tendency of the book is to deprave and corrupt those whose minds are open to immoral influences, or that the book is one of which it was certain that it would suggest thoughts of a most impure character, and I am unable to hold that it comes within the purview of section 292 of the Indian Penal Code. The conviction of the petitioner and the sentence passed upon him are accordingly set aside. The fine, if paid, will be refunded.

E. H. M.

Rule absolute.

APPELLATE CIVIL.

Before Sir Lawrence H. Jenkins, K.C.I.E., Chief Justice, and Mr. Justice N. R. Chatterjea.

HASUN MOLLA

v.

TASIRUDDIN.*

1911

Nov. 22.

Appeal—Land Acquisition—"Award"—Refusal to restore claim-case, if an award—Land Acquisition Act (I of 1894), s. 54.

An order of the Special Land Acquisition Judge, refusing to restore a claim-case by setting aside a decree passed *ex parte* for default of the claimant, is not an "award" and does not come under s. 54 of the Land Acquisition Act.

An appeal does not, therefore, lie against such an order.

APPEAL by the petitioners, Hasun Molla and others, for restoration of a claim-case disposed of *ex parte*.

The petitioners' case was that they were prevented from appearing on the date fixed for the hearing of the case owing to the laches of their pleader's *mohurrir*, who had not informed them of the date fixed for the hearing of the case, and that this, in the circumstances of the case, should be regarded as "sufficient cause" for their non-appearance. The Special Land Acquisition Judge did not believe the petitioners' case to be true, nor that the circumstances furnished sufficient grounds for the revival of the original case. The application was therefore rejected.

The petitioners thereupon preferred this appeal to the High Court.

* Appeal from order, No. 302 of 1910, against the order of Arthur Goodeve, Special Land Acquisition Judge of 24-Pargannahs, dated June 6, 1910.

1911

HASUN MOLLA v. TASIRUDDIN.

Babu Bhupendra Chandra Guha, for the respondents, raised a preliminary objection that no appeal lay. He said that an appeal could lie only under s. 54 of the Land Acquisition Act, and that unless there was an "award," no appeal lay under the section. A refusal to restore a case is not an "award."

Babu Dhirendra Lal Khastgir, for the appellants. The refusal was a final order and had the force of an "award." It was, therefore, appealable.

JENKINS C.J. AND CHATTERJEA J. The right of appeal in proceedings before the Court under the Land Acquisition Act of 1894 is defined by section 54. Therefore we have to see whether the order, of which complaint is now made, is an award or any part of an award. That has not been and could not be contended, and therefore no appeal lies. We must accordingly dismiss the appeal with costs.

S. M.

Appeal dismissed.

MATRIMONIAL JURISDICTION.

Before Mr. Justice Fletcher.

FLORENCE AMELIA THOMPSON

v.

GEORGE S. THOMPSON;

AND

GEORGE S. THOMPSON

v.

FLORENCE AMELIA THOMPSON AND ANOTHER*

1911

Nov. 29.

Divorce—Condonation of Incestuous Adultery—Cruelty, degree of, necessary to revive condoned adultery—Subsequent conduct, without physical violence, causing injury to health.

Where a husband had committed incestuous adultery which the wife had condoned, and subsequently the husband, without actually using physical violence, was guilty of such treatment and conduct as caused the wife's health to suffer :—

Held, that such treatment amounted to cruelty, and the incestuous adultery had been revived.

A lesser degree of cruelty is necessary to revive a condoned offence than to found an original charge.

Durant v. *Durant* (1), *Bramwell* v. *Bramwell* (2), *Cooke* v. *Cooke* (3), *Ridgway* v. *Ridgway* (4) approved and followed.

THESE were cross-petitions by the wife and husband respectively for dissolution of marriage. The parties were married on the 31st October 1901 at the Congregational Chapel at Hastings, in Calcutta, and there was one child of the marriage, a girl, born on the 23rd September 1905.

* Original Civil Suit No. 4 of 1911 and No. 7 of 1911 (Matrimonial Jurisdiction).

(1) (1825) 1 Hag. Eccl. Rep. 733.
(2) (1831) 3 Hag. Eccl. Rep. 618.
(3) (1863) 3 Sw. & Tr. 126.
(4) (1881) 29 W. R. (Eng.) 612.

1911

THOMPSON v. THOMPSON.

The wife, Florence Amelia Thompson, in her petition prayed for a dissolution of her marriage on the following grounds :—(i) That her husband had, in or about November 1908, committed incestuous adultery with her married sister, who was then residing with them, which offence she had condoned ; (ii) that her husband had subsequently been guilty of cruelty towards her, which cruelty, she submitted, revived the offence of incestuous adultery.

The husband, George Sprott Thompson, denied both the charges, and in his cross-petition prayed for a dissolution of his marriage on the ground that his wife herself had committed adultery with one Hugh Doherty.

It was proved that the husband had committed incestuous adultery with his wife's married sister, but it was not proved that the wife had committed adultery with Hugh Doherty. With respect to the charge of cruelty, the evidence was, in substance, as follows :—

FLORENCE AMELIA THOMPSON. After the incident with my married sister, from the time I forgave my husband, his disposition towards me was very indifferent and silent. In August 1909 my husband went to Vasco de Gama in Southern India. Up to that time marital relations continued between us. I subsequently joined him at Vasco de Gama. We had relations once there, and then they ceased. He gave me no reason for it. We occupied the same room. He spoke to me very little and was very little attentive. It preyed upon me so much that I had very little appetite. I could not sleep thinking of what had happened in the day. If I asked him a question, I would have to follow him from room to room to coax an answer. In January 1910 we returned to Howrah, and my mother stayed with us. I confided to her my husband's neglect of marital relations. My mother went to Darjeeling in March 1910, and I went about the 1st May and stayed till October with my parents. I wrote to my husband almost every day. He wrote about once a month. I returned to Howrah in October. Marital relations were never resumed. Eventually I noticed something about my husband's habits. He used to close himself in his bath-room for about 20 minutes. One day, early in February or March 1911, I saw him in the bath-room in an act of self-abuse. It

gave me such a shock that I have never done thinking about it. It affected my health very much. It affected my mind, and my mind affected my body. I could never eat. I suffered nightly from cramps due to nothing else but emptiness. I could sleep very little. I consulted Colonel Pilgrim and Colonel Maynard.

Cross-examined.—I have no affection for my husband now. It ceased more than five years ago. It was gradual. I had a certain amount of affection, I suppose, up to the last.

MARY ANNE KEBLE. I am the petitioner's mother. When my daughter married, her disposition was very bright. Her husband's disposition is very sulky. In the house he never spoke to or took notice of her. He was silent and indifferent. In 1908 my daughter became a wreck. In 1909 she became very ill and complained about her marital relations with her husband.

Cross-examined.—No matter what my daughter ate, her mind was upset, and she could not digest. In the house her husband only spoke to her on matters connected with the household. In 1910, when my daughter stayed with us in Darjeeling, I saw her write to her husband every day, and was astonished as she got no letters. I could see her disappointment when she received no letters by the mail. In February 1911, she told me that she had found her husband in an act that was . . . (stopped). She was ready to drop.

JOHN ALFRED KEBLE. I am the petitioner's father. When my daughter married, she was a very fine girl. Her husband always treated her with indifference and silent contempt. In 1910, my daughter became a wreck. She weighed 7st. 7lbs. Her normal weight was about 9st. She could not eat or sleep and was always complaining.

Cross-examined.—I wrote in one of my letters that my daughter's disposition is sharp and hasty. It is exaggerated to give point to the letter. Her disposition now is crushed.

HERBERT WILSON PILGRIM. I examined Mrs. Thompson on the 5th March 1911. I found her suffering from anæmia and indigestion. Her blood was impoverished, and with it were certain abnormal sounds in her heart. I found no organic disease. Apathy and habitual indifference on the part of her husband, severance of marital relations against her will, and callousness would account for her condition. I could find nothing else.

F. P. MAYNARD. I examined Mrs. Thompson on the 9th March 1911. I found her in a state of impaired health, suffering from dyspepsia of an atonic kind. I found no organic disease. Mental worry and trouble could produce such a state of body. Apathy and indifference on the part of her husband, and abandonment of marital relations, while occupying the

1911

THOMPSON v. THOMPSON.

same bed, would produce it. I could not find any other cause. She weighed 7st. 7lbs. It is very low. If the conditions I found and the cause continued, it would cause further deterioration and would ultimately cause some illness.

Cross-examined.—If she had no affection for her husband, and had misconducted herself with another man during that period, it would tend to neutralise the effect on her health.

Mr. Avetoom (with him *Mr. Charles Bagram*), for George Thompson. The evidence in this case, even if true, does not amount to cruelty in law. The definition of legal cruelty is that which may endanger the life or health of the party: *Waring* v. *Waring* (1). In *Cousens* v. *Cousens* (2), where the facts were very similar to the present case, it was held that to constitute cruelty there must be threats or acts of personal violence. In *Russell* v. *Russell* (3), which is now the leading authority, it was decided by the majority of the House of Lords that in order to establish cruelty there must be evidence of bodily hurt, or danger to life, limb or health, or a reasonable apprehension of one or other of these. In the present case there is no such evidence, and the cruelty has therefore not been established.

Mr. P. L. Buckland (with him *Mr. J. W. Langford James*), for Mrs. Thompson. My first submission is that a lesser degree of cruelty is necessary to revive a condoned offence than to found an original charge: *Durant* v. *Durant* (4), *Bramwell* v. *Bramwell* (5), and *Cooke* v. *Cooke* (6). This principle, which was laid down by the old Ecclesiastical Courts, has been followed in *Dent* v. *Dent* (7), which decided that the word "condonation" has the same meaning in the Divorce

(1) (1813) 2 Phillim. 132.
(2) (1865) 34 L. J., P. & M., 139.
(3) [1897] A. C. 395.
(4) (1825) 1 Hag. Eccl. Rep. 733, 765.
(5) (1831) 3 Hag. Eccl. Rep. 618, 635.
(6) (1863) 3 Sw. & Tr. 126, 137.
(7) (1865) 34 L. J., P. & M., 118.

Acts as it had in the Ecclesiastical Courts, and the doctrine of revival is equally applicable to it.

Condonation is conditional forgiveness, and any subsequent misconduct on the part of the husband, even an attempt to take liberties with a female servant in the house and solicit her chastity, will revive condoned adultery: *Ridgway* v. *Ridgway* (1).

Physical violence is not necessary to establish cruelty. It is sufficient to show that the wife's health suffered from the treatment of the husband or from his conduct: *Walmesley* v. *Walmesley* (2), *Thompson* v. *Thompson* (3), *Jeapes* v. *Jeapes* (4), and *Kelly* v. *Kelly* (5), which was approved of in *Bethune* v. *Bethune* (6); and the cumulative effect of a husband's conduct without personal violence, where it prejudiced the wife's health, has been held to constitute cruelty: *Cochrane* v. *Cochrane* (7). In *Russell* v. *Russell* (8), the remarks of the learned Judges show that it is not absolutely necessary that there should be physical or personal violence to constitute cruelty. In the present case it has been proved that the wife's health suffered from the treatment of the husband, and she is therefore, on the authorities cited, entitled to a decree.

Mr. E. P. Ghose (with him *Mr. H. G. Pearson*), for the co-respondent Hugh Doherty, submitted that there was no evidence that his client had committed the adultery charged.

Mr. Avetoom, in reply, pointed out that the authority of *Durant* v. *Durant* (9) had been questioned by Lord Blackburn in *Collins* v. *Collins* (10).

(1) (1881) 29 W. R. (Eng.) 612.
(2) (1893) 69 L. T. 152.
(3) (1901) 17 T. L. R. 572.
(4) (1903) 89 L. T. 74.
(5) (1870) L. R. 2 P. & D. 59.
(6) (1890) 63 L. T. 259.
(7) (1910) 27 T. L. R. 107.
(8) [1897] A. C. 395.
(9) (1825) 1 Hag. Eccl. Rep. 733.
(10) (1884) L. R. 9 A. C. 205, 241.

1911

THOMPSON v. THOMPSON.

FLETCHER J. These are two cross-petitions for divorce, which by the consent of the parties were heard together.

The first petition presented by the wife, Florence Amelia Thompson, against her husband, George Sprott Thompson, claims a divorce on the ground of incestuous adultery by the husband. In answer to that petition, the husband denies the incestuous adultery, and charges his wife with adultery (the same acts which form the subject of the second petition), and the answer to the husband's petition is a denial by the wife, and the acts of which she complains in her own petition. Therefore the facts in the two petitions are the same, the position only being reversed; the husband being in the one case respondent and in the other case petitioner. The co-respondent to the husband's petition is Hugh Doherty, who is in business in Calcutta.

It appears from the petition and the evidence that the husband and wife were married on the 31st of October 1901 at the Congregational Chapel at Hastings in this town.

The parties profess the Christian religion.

After the marriage the parties first of all lived in a boarding house in 13, Camac Street, and then they removed to 13, Telkul Ghât Road, Howrah, as being nearer the husband's place of work, the husband being employed in an engineering firm at Howrah; and after that they left that residence where they were for two and a half years, and lived in 28, Grand Trunk Road together, until the wife finally left her husband on the 28th of March 1911.

There is one child of the marriage, Sylvia Irene, born on the 23rd September 1905.

The wife charges in paragraph 4 of the petition "that on various occasions, in or about November or

December 1908, the respondent at 13, Telkul Ghât Road, committed incestuous adultery with Ada Goodwin, the sister of the petitioner, who was then residing with your petitioner."

[His Lordship then dealt with the evidence relating to the charge of incestuous adultery against the husband, and continued:]

I have no doubt that the husband committed incestuous adultery with his sister-in-law.

The next question is, has that incestuous adultery been revived by the subsequent conduct of the husband? First of all, it is necessary to decide in what manner condoned adultery is revived, and I refer to the cases cited in the Court of Arches. First there is the case of *Durant* v. *Durant* (1). There the Dean of the Arches expressed his opinion thus: "Under these authorities (which he cited) I am inclined to hold: first, that cruelty will revive adultery, and, secondly, that less is necessary to revive than to found an original sentence." Then there is the case of *Bramwell* v. *Bramwell* (2). That was decided by a very distinguished Judge, Dr. Lushington. He followed the opinion that has been expressed by Sir John Nichols, Dean of the Arches, in *Dowden* v. *Dowden*. That was also followed in two other cases, the first one of which is *Cooke* v. *Cooke* (3). After the constitution of the Royal Court for matrimonial cases, when the Ecclesiastical Jurisdiction had been taken away, a Judge in that Court (I think it was Sir John Wilde) also adopted the opinion which has been expressed in those other cases. It has been followed also by the late President of the Probate and Divorce Division, Lord Hannen, in the case of *Ridgway* v. *Ridgway* (4). So one must

(1) (1825) 1 Hag. Eccl. Rep. 733.
(2) (1831) 3 Hag. Eccl. Rep. 618.
(3) (1863) 3 Sw. & Tr. 126.
(4) (1881) 29 W. R. (Eng.) 612.

1911

THOMPSON v. THOMPSON.

FLETCHER J.

apply one's mind to this case having regard to the authorities that have been cited.

[His Lordship then dealt with the evidence relating to the charge of adultery against the wife, and continued as follows:]

The husband has failed to establish that the wife and co-respondent committed adultery.

The question is, has the incestuous adultery, which the wife condoned certainly on the 1st January 1909, been restored by the subsequent conduct of the husband?

I am satisfied that the husband in this case, as Mrs. Keble said, only spoke to his wife on household matters. That obviously was not the terms on which the wife forgave the husband. The wife forgave the husband on the footing that if she came back to him, he should conduct himself in a manner in which a husband should conduct himself, not that the wife should be spoken to only on household matters, and that she should be treated with what has been called in the case "silent indifference."

The evidence in this case shows that the wife's health has suffered.

I do not agree with the statement as to why marital intercourse ceased, namely, that the *ayah* told the husband something. I think it is much more probable that the husband had during his absence from his wife acquired vicious habits. That a man should during this long period, even admitting the absence of the wife during the hot weather in Darjeeling, sleep alongside a young wife without resuming marital intercourse is very unusual, and that the husband satisfied his passions in other ways is very probable. Apart from the fact that the husband gave way to disgusting habits, it is a fact that the wife's

1911

THOMPSON v. THOMPSON.

FLETCHER J.

health suffered in consequence of the husband's treatment.

In my opinion the wife has established in this case that her health suffered by the conduct of the husband after she condoned his incestuous adultery, and the result of that is that the incestuous adultery has been revived, and therefore the wife is entitled to a decree.

On the wife's petition, I grant a decree *nisi* with the usual order for costs, including all reserved costs, and the husband's petition is dismissed with costs against the respondent and co-respondent. The wife to have custody of the child.

C. E. B.

CRIMINAL REVISION.

Before Mr. Justice Holmwood and Mr. Justice Sharfuddin.

GORA MIAN

v.

ABDUL MAJID.*

1911.

Dec. 6.

Magistrate, jurisdiction of—Criminal Procedure Code (Act V of 1898), ss. 100, 552—Jurisdiction of first class Magistrate, upon an application under s. 552 of the Code, to issue a search warrant under s. 100 on a fresh complaint of facts alleging wrongful confinement—Warrant under s. 100 drawn up on a printed form used under s. 98, with the necessary alterations—Presumption that such alterations were made—Destruction of original warrant by the accused—Resistance to execution of such warrant and assault on the police—Penal Code (Act XLV of 1860), ss. 147 and 332.

Where, on an application made under s. 552 of the Criminal Procedure Code, to a Magistrate of the first class, he examined the applicant on oath,

*Criminal Revision, No. 1082 of 1911, against the order of J. A. Dawson, Additional Sessions Judge, Chittagong, dated July 27, 1911.

1911

GORA MIAN v. ABDUL MAJID.

recorded a statement of facts alleging wrongful detention of his wife, and directed the issue of a search-warrant under s. 100:

Held, that he had jurisdiction to do so.

A search warrant under s. 100 of the Code, drawn up, in the absence of a printed form of warrant thereunder, on a printed form used under s. 98, with the necessary alterations, is not illegal.

Bisu Haldar v. *Probhat Chunder Chuckerbutty*(1) distinguished.

Where the original warrant was in such a case not produced at the trial owing to its destruction by the accused at the time of its execution:

Held, that it must be taken that it contained the substance of s. 100, and that the necessary alterations were made.

ON the 10th April 1911, one Abdul Majid filed an application, purporting to be made under s. 552 of the Criminal Procedure Code, before the Joint Magistrate of Chittagong, alleging that his wife, Mamuda Khatun, had been taken away to the house of her uncle, Abdul Ghani, and was detained against her will with the object of getting her married to some one else. The Magistrate, finding that he had no jurisdiction under the section stated, examined Abdul Majid on oath, recorded, on the back of the original petition, a statement of facts under ss. 342 and 498 of the Penal Code, and directed the issue of a search warrant under s. 100 of the Criminal Procedure Code. It appeared that there was no printed form of a warrant under s. 100, and that the clerks who drew up warrants always employed in such cases a printed form in use under s. 98, with the necessary alterations to make it conform to the provisions of the former section. The warrant in the present case was drawn up on a form under s. 98. The complainant went with a head-constable and two constables to the house of the petitioner Abdul Ghani and surrounded it with a view to search the premises. Abdul Ghani came out and the warrant was shown to him. He then raised an outcry, and a number of villagers came up and beat the complainant

(1) (1907) 6 C. L. J. 127.

1911

GORA MIAN v. ABDUL MAJID.

and the police party, capturing the head-constable. The others escaped and went to the thana and came back with a rescue party. On the arrival of the latter, the persons concerned in the first occurrence were arrested and identified. They were tried by a Deputy Magistrate at Chittagong on charges under ss. 147 and 332 of the Penal Code, and convicted and sentenced thereunder, on the 14th July 1911, to rigorous imprisonment for nine months and a fine of Rs. 30 each. The common object laid in the charge under s. 147 was to resist the police on the execution of a search warrant for the production of Mamuda, and to beat the police. The charge under s. 332 stated that the accused voluntarily caused hurt to the head-constable to deter the police from doing their duty, namely, the execution of the above warrant.

An appeal from the order of conviction was dismissed by the Additional Sessions Judge of Chittagong on the 27th July 1911. The original warrant was not produced at the trial, but the learned Judge found that it was snatched away and destroyed by some of the accused at the time of the occurrence. He also found that, though the heading of the warrant was not corrected, and there was no direct evidence of the unnecessary words in the printed form used under s. 98 having been scored through, the writer of the warrant must have made the necessary alterations in the body of the document. The petitioners then moved the High Court and obtained the present Rule.

Mr. A. Chaudhuri and *Babu Khitish Chandra Sen* for the petitioners.

The Deputy Legal Remembrancer (*Mr. Orr*), for the Crown.

HOLMWOOD and SHARFUDDIN JJ. This was a Rule calling upon the District Magistrate of Chittagong to

1911

GORA MIAN v. ABDUL MAJID.

shew cause why the conviction and sentence passed on the petitioners should not be set aside on the ground that, on the facts proved, it ought to be held that the alleged search warrant was illegal and without jurisdiction, and resistance, if any, to the execution thereof does not amount to any offence.

We are unable to find on the facts that the alleged search warrant was either illegal or without jurisdiction. The order of the Magistrate passing it was made with jurisdiction, and it was an order for a warrant under section 100 for Mamuda Khatun for immediate appearance. Now that warrant was snatched away and destroyed by the accused persons, and it must, therefore, be presumed that it contained the substance of what is set out in section 100 although admittedly it was drawn up on a form which is printed for use under section 98. Now, under section 100 the only kind of warrant that can be issued is a search warrant, and the person to whom such warrant is directed may search for the person so confined, and such search shall be made in accordance therewith, and the person, if found, shall be immediately taken before the Magistrate. Now, let us see how this warrant under section 100 can be conveyed on a form under section 98. It is perfectly clear that the form under section 98, after scratching out clauses (*c*) and (*d*), would be perfectly sufficient for the execution of a process under section 100. It is in evidence that there is no form printed under section 100, and that the form under section 98 is always used for these warrants under section 100. We must, therefore, take it that the portions which had to be altered were altered. But a warrant under section 98, used for the purpose of section 100, would run perfectly correctly in the words of section 98—to enter, with such assistance as may be required, such place, that is,

the house where the woman was confined, and to search the same in the manner specified in the warrant, and to take into custody and carry before the Magistrate the person named therein. Now, the evidence is that the person named therein is this Mamuda Khatun. We, therefore, find that the alleged search warrant was not illegal nor without jurisdiction, and that any resistance thereto was, therefore, an offence.

Several cases have been cited to us, but there is only one of them which in any way touches this case, and this is the ruling in *Bisu Haldar* v. *Probodh Chandra Chakravarti* (1). There the person applied under section 100 of the Criminal Procedure Code for a search warrant, but the Magistrate issued a warrant under section 96 of the Criminal Procedure Code under which the police supposed themselves to be acting: *held*, that the issue of the warrant under section 96 was illegal and the order was a nullity. Reading this finding and the judgment in the case, it is clear that the error in that case was an error in substance and not in form. The Magistrate himself with his eyes open issued the warrant under section 96. The warrant purported to be for the purpose of section 96, and the police who executed it supposed that they were acting under section 96. The case, therefore, is clearly distinguishable from the present case where the error, if there is any, as to which we know nothing, could have been one merely of form. But having regard to what the learned Judge has said with respect to these cases in the last passage in his judgment, we think that the accused have been too harshly dealt with. The learned Judge says: "This is one of those cases, of not infrequent occurrence, which show how keenly Mahomedans resent the issue of any process against a woman who may be an accused or a

(1) (1907) 6 C. L. J. 127.

1911

GORA MIAN v. ABDUL MAJID.

witness in a 498 Indian Penal Code case, or analogous case; and it is doubtless because of such cases that the Government of this Province has recently issued an order that such complaints should in the first instance be referred to a local Mahomedan Marriage Registrar or other gentleman of position for enquiry and report. Probably if this had been done in the present instance, the present case would not have arisen."

We think that there is a great deal to be said from this point of view, and while we agree with the learned Judge that the police, when they get a warrant from the Magistrate, are bound to execute it and must be fully protected in the execution thereof, we are willing to take a more lenient view of the conduct of the accused in the present case than the lower Courts have found it necessary to do.

We, therefore, in discharging the Rule, direct that the sentence on the petitioners be reduced to one of three months' rigorous imprisonment, and that the fine of 30 rupees each passed upon them do stand with the alternative sentence of imprisonment. The accused will, therefore, surrender to their bail, and serve out the rest of their modified sentence.

E. H. M. *Rule discharged.*

CRIMINAL REVISION.

Before Mr. Justice Holmwood and Mr. Justice Sharfuddin.

ABDUL GHANI

v.

AZIZUL HUQ.*

1911

Dec. 13

Mahomedan law—Bigamy—Effect of apostacy of husband after marriage, and re-conversion to Islam during the period of iddut—Second marriage of the wife with another man during such period—Abetment—Penal Code (Act XLV of 1860), ss. 494 and $\frac{494}{109}$.

Under the Mahomedan law the marriage of a man, who subsequently embraces Christianity, becomes *ipso facto* void, notwithstanding his reconversion to Islam during the period of *iddut;* and the wife, in contracting a second marriage during such period, does not commit bigamy under s. 494 of the Penal Code.

Per HOLMWOOD J. A second marriage contracted by the wife during the period of her *iddut* is not void by reason of its taking place during the life of the first husband, but by reason of a special doctrine of the Mahomedan law with which the Penal Code has nothing to do. Where the parties have acted in good faith or what they believe to be a sound interpretation of a very difficult point of Mahomedan law, even though they are mistaken, the consequences cannot be visited upon them in a Criminal Court in a trial for bigamy.

ONE Azizul Huq was married to the petitioner, Jaitan Bibi, in 1906, the parties belonging to Hanafi sect of Mahomedans. The girl was given in marriage by her father, the petitioner Abdul Ghani, and the marriage was duly registered by the Mahomedan Marriage Registrar. About a year ago a difference arose between the families of the husband and wife, and Azizul Huq took his wife away by force from

* Criminal Revision No. 993 of 1911 against the order of Naba Gopal Chaki, Sub-divisional Officer of Gopalganj, dated June 23, 1911.

1911

ABDUL GHANI v. AZIZUL HUQ.

her father's house, where she was then residing, but the father persuaded her to return. It appeared that Azizul embraced Christianity some time after his marriage with Jaitan, but reverted to Islam during the period of her *iddut*. Before the expiry of the latter period, Abdul Ghani married her to the petitioner, Abdul Aziz. Azizul thereupon filed a complaint against Jaitan, her father and her second husband, under ss. 494 and $\frac{494}{109}$ of the Penal Code, respectively, before the Sub-divisional Officer of Gopalgunj, who directed a local investigation, before process, by the Mahomedan Marriage Registrar. The latter reported that both marriages had taken place, but that the first one was not celebrated according to social customs and was further void by reason of the apostacy of the complainant. The Magistrate, after recording evidence, held that the marriage with the complainant was duly solemnized according to Mahomedan law, notwithstanding the non-observance of some minor social customs, and that, although it was dissolved by the complainant having become a Christian for a month and a half, no fresh marriage was necessary on account of his re-conversion to Islam during the period of the wife's *iddut*. He also found the second marriage proved, and committed the accused to the Court of Sessions under ss. 494 and $\frac{494}{109}$ of the Penal Code, respectively. The petitioners, thereupon, moved the High Court under s. 215 of the Criminal Procedure Code, and obtained this Rule to quash the commitment.

Mr. Acharya (with him *Babu Satyendra Nath Mukherjee*) showing cause. The marriage tie of a Mahomedan is not dissolved *co-instanti* on the apostacy of the husband. He may, on re-conversion to Islam during the period of *iddut*, resume cohabitation without a fresh contract of marriage with the woman.

During such period she cannot lawfully marry another man. Refers to Rahim's Muhammadan Jurisprudence, p. 341; Wilson's Anglo-Muhammadan Law, 3rd ed., pp. 109, 512, 514, 524; Rahman's Institutes of Musalman Law, Art. 304 and the authorities cited therein; Ameer Ali's Mahomedan Law, Vol. II. (3rd ed.), p. 431; Baillie's Digest, pp. 182, 352. Marriage is much more than a private contract: it is one which creates a status and involves the status and rights of persons not parties to it, *e.g.*, the issues thereof. It further imposes on the parties special duties towards the State. It cannot be dissolved at the will of the parties: see Dicey's Article in the Law Quarterly Review, vol. XXV, pp. 204 and 205, and his comments on *Chetti* v. *Chetti* (1). Herein we find the root causes of the period of *iddut*. Such a probationary term has also been fixed by s. 57 of the Divorce Act (IV of 1869). A marriage, under Mahomedan Law, is dissolved *ipso facto* by apostacy, that is, without a judicial decree, but not *co-instanti* and a fresh marriage contracted during the *iddut* is illegal.

Mr. Huq (with him *Maulvi Shamsul Huda*), for the petitioner. The marriage tie is dissolved immediately on the apostacy of the husband, and he ceases thereafter to possess such status. Refers to the Hedaya, as translated by Hamilton, Vol. I, Book 2, Chap. 5. If a woman contracts a marriage with another man during the *iddut*, the marriage is invalid; but she cannot be said to have married again during the life-time of a husband within s. 494 of the Penal Code.

Mr. Acharya, in reply.

Cur. adv. vult.

HOLMWOOD J. I have had the advantage of reading the judgment which is about to be delivered by

(1) [1909] P. 67.

1911

ABDUL GHANI v. AZIZUL HUQ.

HOLMWOOD J.

my learned brother, and I entirely agree with him that the marriage of a Mahomedan man and woman is rendered *ipso facto* void by the apostacy of the former, though there are certain methods, as pointed out by my learned brother, by which the marriage tie may be renewed.

But what I wish to lay stress upon is that whatever view be taken of the uncertain status of the parties during the period of *iddut*, and however illegal and void under Mahomedan law the second marriage of the woman during the period of *iddut* may be, there is no foundation for any charge under s. 494 of the Indian Penal Code against her. Her second marriage is not void by reason of its taking place during the life of a prior husband, but by reason of a special doctrine of the Mahomedan law of *iddut* with which the Indian Penal Code has nothing to do.

The parties in this case appear to have acted in good faith on what they believed to be a sound interpretation of a very difficult point of Mahomedan law. Even though they were mistaken, the consequences could not be visited upon them in a Criminal Court administering the penal laws against bigamy. The consequence is a purely civil one, namely, the nullity of the second marriage. For these reasons, I agree that the commitment of the petitioners to the Sessions under s. 494 and s. $\frac{494}{109}$ of the Indian Penal Code must be quashed, and the Rule made absolute.

SHARFUDDIN J. This is a Rule calling on the Magistrate and on the complainant to show cause why the commitment of the petitioner should not be quashed on the ground that the first marriage has been dissolved.

It appears that one Azizul Huq and Musummat Jaitan, both Mahomedans of the Hanafi sect, were

husband and wife. Some years after marriage the husband, Azizul Huq, became a Christian, but within a month and-a-half he again reverted to Islam. During the above interval, the woman, Jaitan, married a man named Abdul Aziz, and her father gave her in marriage to the new husband.

The first husband, after his conversion to Islam, complained with the result that Musummat Jaitan, her father Abdul Ghani, and her second husband Abdul Aziz have been committed to the Court of Sessions for trial, the first under section 494 of the Indian Penal Code, and the other two for abetment of that offence. On an application by the three accused, under section 215 of the Criminal Procedure Code, to quash the commitment, the present Rule was granted.

The point of law on which the present application was made is, that, as the Mahomedan Law does not permit a marriage between a Mahomedan female and a non-Mahomedan male, the marriage tie in the present case was broken on the complainant's conversion to Christianity. It was also contended that in such a case Musummat Jaitan did not marry Abdul Aziz during the lifetime of a husband.

On behalf of the complainant it was urged that inasmuch as Azizul Huq reverted to Islam, during the period of *iddut*, he could continue his conjugal rights without re-marrying Musummat Jaitan, and on his behalf a certain passage from *Raddul-Muhtar* was relied on, in order to show that the marriage does not become dissolved instantly the man abandons Islam. We have consulted the original book in Arabic, and the context relied upon is—

المرتد إذا لحق بدار الحرب فطلق امرأته لا يقع و إن عاد مسلماً و هي في العدة فطلقها يقع —

1911

ABDUL GHANI v. AZIZUL HUQ.

SHARFUDDIN J.

The translation of this passage is—"if an apostate goes to Darul-Harab (an alien country where the laws of Islam are not in force) and arriving there divorces his wife, the divorce will not take place; but if he returns as a Muslim and divorces her during the *iddut* period, the divorce will take place: *vide Raddul Muhtar*, page 425, Egyptian edition.

On the strength of the above doctrine it is urged that the marriage tie does not absolutely break during the period of *iddut*, for otherwise a divorce given by the husband after his return to the faith would not be effective.

The view, however, of lawyers like the authors of the *Hedaya*, the *Fatawa Alamgiri* and some other works, unanimously is that apostacy from Islam, whether it takes place before or after consummation, *ipso facto* dissolves the marriage tie.

The after-effects of separation through *talaque* (divorce) and apostacy are different. There are three forms of *talaque*, namely:—*(a) Talique-rajai* (طلاق رجعي). In this *talaque*, the husband says *tal-luk-to-kay* (طلقتك) without any intention on his part that it should operate as *talaque-ba-in* (طلاق بائن), which is the second form of *talaque*. In *talaque-raiai* the woman has to observe *iddut;* but during the period of *iddut* if the husband reverts to Islam, he can continue his conjugal rights without renewal of the marriage tie.

(b) Talaque-ba-in.—In this form of *talaque* the husband is required to utter the expression (طلقتك) which means "I renounce thee" with the intention that it should operate as *talaque-ba-in*, the effects of which are that the woman has to observe *iddut;* and

if the husband reverts, he can continue his conjugal rights by a renewal of the marriage tie (تجديد عقد).

(c) Talaque-mogallaz (طلاق مغلظ). In this form of *talaque* the husband is required to utter the above expression three times, or he may say: "I give you three *talaques*." The effects of this form of *talaque* are that the woman has to observe the *iddut* period and she becomes *haram* (حرام), that is, within prohibited degrees, and the husband cannot re-marry her until she has formed another connection by marriage with another man, cohabitation has taken place with this other husband and the latter has divorced her, and she has observed the period of *iddut* after her second divorce. The stage of the second marriage and the second divorce is technically called *halala* (حلالہ).

From the above it is manifest that in every form of separation caused either by *talaque* or apostacy, the woman has to observe the period of *iddut*. There is consensus of opinion that a woman's marriage during *iddut* is illegal, but in case of *talaque rajai*, the husband can continue his conjugal rights without a re-marriage if he reverts during the *iddut*.

There is a passage in the *Sharah Waqaya* (شرح وقایہ), chapter *Al-murtud* (المرتد) page 377, Lucknow edition, which also lays down that after apostacy the marriage tie becomes null, but the man can still exercise his right of *talaque*. The passage referred to is—

وَبَطَلَ نِكَاحُهُ ذَبْحُهُ وَصَحَّ طَلَاقُهُ - إِعْلَمْ أَنَّ النِّكَاحَ وَالذَّبْحَ بَاطِلَانِ اتِّفَاقاً - وَالطَّلَاقُ وَالْاِسْتِيلَادُ صَحِيحَانِ اتِّفَاقاً -

1911

ABDUL GHANI v. AZIZUL HUQ.

SHARFUDDIN J.

which means "the *nikah* (marriage) of the apostate with his Mahomedan wife becomes *batil* (باطل), that is, null, but he can still legally divorce her."

It is clear from the above passage that in spite of the marriage tie having been absolutely broken in consequence of apostacy, the man has still the right, which is vested in him, to divorce his Mahomedan wife. It, no doubt, seems an anomaly that an apostate husband can divorce his Mahomedan wife. The Mahomedan jurists have explained the anomaly; as, for example, the author of *Raddul-Muhtar* has explained it in the following passage :—

فيقع طلاقه عليها في العدة مستتابعا فائدته من حرمتها عليه بعد الثلاث مغلظة بوطئي زوج اخر.

which means that the object of vesting the power of divorce in the apostate is for a certain purpose only, namely, if an apostate recites the formula (يغه) three times, and thus divorces his wife in the *mogullaz* (مغلظ) form of *talaque*, she becomes *haram* to him, as stated above in the third form of *talaque*, that is to say, he cannot continue his conjugal rights with the woman without marriage or with a renewal of marriage without the intervention of a *halala*.

On reference to the different authorities, we are of opinion that Musummat Jaitan's marriage with the complainant became absolutely null at the moment he apostatised, and that from the date of his apostacy he was not her husband, and that he could re-marry her during the period of *iddut* if he reverted to Islam.

We have observed before that during the period of *iddut* a woman cannot marry another husband.

In the present case she is said to have done so. Her marriage with Abdul Aziz is, therefore, invalid. Her act, therefore, may be considered as invalid and sinful, and according to the jurists it is the duty of the Kazi to separate them and compel her to observe the *iddut* period. In the present case we are not concerned with the question as to whether her second marriage was legal or not according to the Mahomedan law. We are only concerned with the question as to whether her second marriage, if it can be called a marriage, took place during the lifetime of a husband. On the authorities discussed above, we are of opinion that, although her second marriage, having taken place during the period of *iddut*, was not a legal marriage, yet she cannot be said to have gone through the form of the second marriage while her legal husband was alive. For the above reasons, we quash the commitment, and make the Rule absolute.

Rule absolute.

E. H. M.

PRIVY COUNCIL.

*P.C.** 1911

Nov. 14, 15, 16; *Dec.* 14.

MUHAMMAD UMAR KHAN

v.

MUHAMMAD NIAZ-UD-DIN KHAN.

[ON APPEAL FROM THE CHIEF COURT OF THE PUNJAB.]

Custom—Inheritance—Customary Law of Punjab—Sheikh Ansaris, Tribe of—Gift by father to daughter—Estate taken by donee—Evidence and proof of custom—Acquiescence and consequent estoppel—Partition by agreement of parties as acquiescence in title of allottees—Limitation Act (XV of 1877), Sch. II, Art. 118—Ineffective adoption—Mahomedan law.

The appellants claimed possession of the property in suit on the allegation that it was ancestral property to which they were entitled as reversioners. The defence was that the respondent was in possession under a gift from the last owner, a Mahomedan lady who had adopted him as her heir, and who had herself received the property in dispute as a gift from her father in lieu of her mother's dower; and that the suit was barred by limitation. The parties were Sheikh Ansaris of a Pathan tribe of Punjab Mahomedans; and the appellant's case was that according to a custom prevailing in the family no woman could take by gift a greater interest in ancestral property than an estate for life, and without power of alienation, and that the gift to the respondent was therefore void. In dismissing the appeal from the Chief Court of the Punjab:

Held, by the Judicial Committee, on the documentary evidence as to the course of litigation concerning the property, and the circumstances connected with its devolution since 1847, and on the other evidence in the case, that not only had no such custom as alleged, applying to the family,

* PRESENT: LORD MACNAGHTEN, LORD ROBSON, SIR JOHN EDGE and MR. AMEER ALI.

been proved, but the evidence relating to the devolution of the property was inconsistent with the existence of such a custom, and in fact disproved it : nor was it supported by evidence as to the limited rights by custom of a widow in her deceased husband's property, nor by evidence of a custom preventing a Mahomedan father from giving his property to one son to the exclusion of another.

Held, also, that there was strong evidence of the appellant's acquiescence in the respondent's title in the fact that in 1895-96 the principal lands which had been held in undivided shares by the parties were by agreement partitioned, each having allotted to him lands which represented his share ; and that the respondent's share on the partition represented lands which had come to him from the gift which the appellants now disputed as being void.

Semble : That the omission to bring, within the period prescribed by article 118 of schedule II of the Limitation Act (XV of 1877), a suit to obtain a declaration that an adoption was invalid or never in fact took place, was no bar to a suit like the present for possession of property.

Tirbhuwan Bahadur Singh v. *Rameshar Bakhsh Singh* (1), followed.

Under the general Mahomedan law an adoption cannot be made ; and even if it be made, can carry with it no right of inheritance.

APPEAL from a judgment and decree (18th April 1906) of the Chief Court of the Punjab, which reversed a judgment and decree (13th January 1902) of the Court of the District Judge of Jullundur.

The plaintiffs were appellants to His Majesty in Council.

The suit out of which this appeal arose was brought for possession of certain immoveable property situate in Basti Danishmandan in the Punjab, which the plaintiffs claimed to be property originally owned by their ancestor, one Muhammad Ali Shah, and to which they were entitled as reversionary heirs.

The parties were Sheikh Ansaris of a tribe of Mahomedans in the Punjab, and their relationship

(1) (1906) I. L. R. 28 All. 727 ; L. R. 33 I. A. 156.

1911

MUHAMMAD UMAR KHAN *v.* MUHAMMAD NIAZ-UD-DIN KHAN.

is explained by the following pedigree :—

Muhammad Ali Shah (the plaintiffs' ancestor) had three sons, Muhammad Sarwar Khan, Alamgir Khan and Jahangir Khan, the last named of whom had only a daughter, Maryam. Alamgir had three sons, Sarfraz Khan, Shahbaz Khan and Seraj-ud-Din Khan. Muhammad Sarwar Khan had two sons, Muhammad Said Khan and Bahadur Khan. Sarfraz Khan (son of Alamgir) married Maryam (daughter of Jahangir), and of that union Mussammat Zainab was born. Saraj-ud-Din Khan had two sons, Muhammad Umran Khan and Muhammad Pirdad Khan, the plaintiffs and appellants in the present case. Muhammad Said had a son, Muhammad Abdulla; and Bahadur Khan had a son, Shah Nawaz Khan, who died in his father's life-time, leaving Muhammad Mumtaz Khan.

The property in possession of Muhammad Ali Shah was, on his death, divided equally amongst his three sons. According to the plaintiffs, Sarfraz Khan, the son of Alamgir Khan, who had married Maryam, Jahangir Khan's only daughter, succeeded to Jahangir's property as his son-in-law, and (being his nephew) as one of his nearest collateral heirs: but according to the defendant, Jahangir Khan in 1832 transferred all his property by deed of gift to his daughter Maryam "in lieu of the dower of her mother," and during her lifetime Maryam made a gift of this property to her husband Sarfraz Khan. At any rate Sarfraz was in possession of it on Maryam's death in 1846 or 1847; and in 1849 Jahangir's brothers' sons Bahadur Khan, Muhammad Said and Siraj-ud-Din Khan (father of the plaintiffs) took proceedings to recover the property from Sarfraz Khan, but unsuccessfully, as on 16th May 1849 Sarfraz obtained a judgment in his favour. Bahadur Khan alone appealed, but his appeal was dismissed on 3rd August by the Settlement Officer, the claimant being referred to

1911

MUHAMMAD UMAR KHAN v. MUHAMMAD NIAZ-UD-DIN KHAN.

a civil suit; but no further proceeding was then taken.

According to the defendant's case, Sarfraz Khan in 1851 executed a deed of gift whereby he conveyed the whole of his own property inherited from his father Alamgir, together with the property received from his wife, to his daughter Mussammat Zainab (who was married to his sister's son Baghe Khan or Ghulam Mohy-ud-Din) in lieu of her mother's dower.

On the death of Sarfraz Khan on 10th May 1852, Mussammat Zainab had the name of her husband Ghulam Mohy-ud-Din entered in the estate papers instead of that of Sarfraz Khan.

After Sarfraz Khan's death Bahadur Khan and Muhammad Said Khan brought a suit for possession of the property against Ghulam Mohy-ud-Din, in which suit Seraj-ud-Din Khan subsequently intervened claiming a preferential right to it as a brother of Sarfraz Khan. That suit was dismissed by the Assistant Commissioner on 25th June 1859; and an appeal to the Deputy Commissioner was rejected, but it being clear from the evidence of Ghulam Mohy-ud-Din himself that his wife was really the proprietor of the property, the Deputy Commissioner directed that her name should be entered in the estate papers as owner. An appeal to the Commissioner was dismissed on the 25th February 1860, and the judgments of the Courts below were affirmed.

On 6th May 1887, Ghulam Mohy-ud-Din executed a deed stating that he had adopted the defendant Niaz-ud-Din when he was two years old; and in May 1888, Ghulam Mohy-ud-Din and his wife Mussammat Zainab executed a deed of settlement of the whole of the property in suit, together with certain other property in favour of the defendant, and put him into possession. On an application to have the

defendant's name recorded as owner on the ground of his being the adopted son of Mussammat Zainab, the plaintiffs filed objections, but mutation of names was ordered to be effected on 19th December 1888. On the defendant's case it was stated that no steps were afterwards taken by the plaintiffs to challenge the defendant's right, but on the contrary in 1895 and 1896 the plaintiffs and defendant effected private partitions of lands belonging to them and entered against their respective names in the register, and the plaintiffs themselves asked the authorities to record those private arrangements and to have mutations of names effected. As to this the plaintiffs admitted that a private partition took place in 1895-96, but stated it was between themselves, Mussammat Zainab and other co-sharers.

Mussammat Zainab died on 4th May 1899; and the plaintiffs filed the present suit on 11th May 1900 against Muhammad Niaz-ud-Din Khan, the defendant who had taken possession of the property in dispute, claiming to recover possession of it on the following grounds:—

(*a*) that it was the ancestral property of the plaintiffs in which Mussammat Zainab had merely a life-interest by virtue of a gift made by her father;

(*b*) that on her death the plaintiffs, being the nearest collaterals and heirs, were the reversioners entitled to succeed to the property in dispute;

(*c*) that the defendant had unlawfully taken possession of the property and wrongly had his name entered in the official papers as adopted son of Mussammat Zainab, stating also that the property had been settled on him by her;

(*d*) that "Mussammat Zainab never effected any such settlement, nor did she adopt the defendant, nor was she competent by law or custom to transfer the

1911

MUHAMMAD UMAR KHAN v. MUHAMMAD NIAZ-UD-DIN KHAN.

property in dispute; nor could she make an adoption, and any alienation made by her was null and void as against the plaintiffs by the law and custom of the parties and the Riwaj-i-am;' and that an alienation by Mussammat Zainab in favour of Baghe Khan, her husband, had already been set aside by the Court.

The defence was that the suit was barred by limitation, especially as the plaintiffs failed to have the adoption set aside within six years after it became known to them; that the property in suit was not ancestral; that no law or custom existed against the power of alienation of Mussammat Zainab or her predecessors in title; that neither Mussammat Maryam, nor Sarfarz Khan, nor Mussammat Zainab held the property for life only, and the gifts made to them were permanent alienations in the nature of sales; that the plaintiffs were under the circumstances estopped from disputing the defendant's rights; that the adoption of the defendant was not unlawful, nor had Mussammat acted without power in respect of the adoption; that in any event the plaintiffs had no right to the portion of the property which originally belonged to Jahangir Khan; and that the defendant had expended over Rs. 5,000 on improvements which should be repaid to him before the plaintiffs could recover it.

On these pleadings, the District Judge framed the following issues:—

"(1) Whether Sarfraz Khan made the gift in favour of Mussammat Zainab in lieu of her mother's dower, or in consequence of her being his daughter?

(2) Whether by law or custom Mussammat Zainab had, under the gift in question, become an absolute owner so as to have a right of alienation of property, or whether she, in case of her being childless, had only a life interest in the said property, and whether it was to revert to her reversioners on her death?

(3) Whether Mussammat Zainab adopted the defendant, and whether she was competent to do so ?

(4) Whether the settlement of the property in dispute effected by Mussammat Zainab in favour of the defendant was lawful ?

(5) Whether the plaintiffs are entitled to the property in dispute ? If so, what improvements has the defendant made by building and repairing houses and by planting trees and a garden, and whether he is entitled to compensation therefor ?

(6) Whether the present suit is within time for not, having regard to denial of adoption and the fact of possession ?"

The District Judge held that whether the property was given to Mussammat Zainab in lieu of her mother's dower, or as a gift to a daughter, she had only a life-interest in the subject of the gift; that the property not being self-acquired was ancestral in her hands; and that having no power of alienation by custom or otherwise, her gift to the defendant was void; that the adoption of the defendant became known to the plaintiffs in 1888, but that inasmuch as the adoption was "inherently invalid and *ipso facto* void," article 118 of the second schedule of the Limitation Act (XV of 1877) was inapplicable; and that even if it were applicable, the plaintiffs were still entitled to object to the succession of the defendant to the property, as the adoption conferred no status nor any right of inheritance.

In the result the District Judge gave the plaintiffs a decree for possession.

On an appeal by the defendant to the Chief Court, a Divisional Bench of that Court (JOHNSTONE and RATTIGAN JJ.) held, that by their silence after their objections in the mutation proceedings of 1888, and their actions in regard to the partitions in 1895 and 1896, the plaintiffs had acquiesced in the defendant's possession and were now estopped from denying his title; that the fact of the adoption by Mussammat Zainab was proved, and that it became known to the plaintiffs

1911

MUHAMMAD UMAR KHAN v. MUHAMMAD NIAZ-UD-DIN KHAN.

at latest in 1888 that such adoption was not "inherently invalid," so that the suit was barred by article 118 of the Limitation Act; that the evidence established that the Sheikh Ansaris were not "agriculturists" in the proper sense of the term, and that there was no presumption that they adopted agricultural customs; that evidently females and especially daughters are among them a favoured class; and that where it is not specifically proved by the plaintiffs that the tribe in matters connected with the status of females have actually adopted agricultural custom, or some similar restrictive custom, Mahomedan law must be presumed to apply; that in the tribe to which the parties belonged, gifts to females in lieu of dower, and even ordinary gifts by males to females, make the donees absolute owners as in Mahomedan law; and that the suit was, apart from article 118, barred in other ways. The judgment of the Chief Court is reported in full in 42 Punjab Record (1907), page 1.

On this appeal,

De Gruyther, K.C., and *Abdul Majid*, for the appellants, contended that the Chief Court had wrongly held that the suit (one for possession) was barred by limitation. That Court had relied on the cases decided on the Limitation Act, IX of 1871, and had held that the suit was governed by article 118 of the Limitation Act XV of 1877 relating merely to a suit for a declaration that an adoption was invalid. But the suit was governed, it was submitted, by article 141 of schedule II of the Limitation Act, XV of 1877, and it was not necessary to set aside the adoption; this suit could succeed without in any way disturbing the adoption, if it had taken place: for the adoption was invalid and could not affect the

succession of the parties to property. Reference was made to *Tirbhuwan Bahadur Singh* v. *Rameshar Bakhsh Singh* (1), *Jagadamba Chaodhrani* v. *Dakhina Mohan Roy Chaodhri* (2), which, it was contended, covered all cases in which the validity of an adoption was concerned: Limitation Act IX of 1871, schedule II, article 129; Specific Relief Act I of 1877, section 42; *Bijoy Gopal Mukerji* v. *Krishna Mahishi Debi* (3); and Limitation Act XV of 1877, schedule II, article 91.

It was also contended that the Chief Court had erred in allowing the respondent to raise for the first time on appeal the plea of acquiescence, and in deciding that the appellants had acquiesced in the respondent's possession, and in consequence were now estopped from contesting his right to the property in suit; and the evidence was discussed to show that neither by their silence nor by their acts had there been any such acquiescence on the part of the appellants or their predecessors in title.

Another point which, it was submitted, the respondent had been wrongly allowed to raise for the first time on appeal, was that the parties were governed by the Mahomedan law. As to this it was contended that the law governing the parties was not the Mahomedan law, as wrongly held by the Chief Court, but the customary law of the Punjab; that by such customary law no woman could take by gift (or otherwise) more than an interest for life in ancestral property as the property in suit was; that she had no power of alienation; and that therefore Mussammat Zainab had only a life estate in the property, and that the

(1) (1906) I. L. R. 28 All. 727, 739; L. R. 33 I. A. 156, 163.
(2) (1886) I. L. R. 13 Calc. 308; L. R. 13 I. A. 84.
(3) (1907) I. L. R. 34 Calc. 329; L. R. 34 I. A. 87.

1911

MUHAMMAD UMAR KHAN v. MUHAMMAD NIAZ-UD-DIN KHAN.

transfer of it made by her to the respondent, even if it were valid, became void on her death. This custom was, it was contended, established by the evidence on the record, and the following authorities and cases in which the customary law, and not the Mahomedan law, had been held to apply, were referred to:— Rattigan's Customary Law of the Punjab, pages 14, 19, 26, 27 (Explanation 1), 34, 39, 40, 71, 100 and 101; *Hijjoo* v. *Meer Mahomed* (1); *Sher Muhammad* v. *Jafir Khan* (2); *Chaughatta* v. *Mokham Din* (3); *Ghulam Bakhsh* v. *Massama* (4); *Muhammad* v. *Umar Bibi* (5); *Miran Bakhsh* v. *Ala Ditta* (6); *Lekna* v. *Thakri* (7); *Muhammad Hussain* v. *Sultan Ali* (8); *Hayat Muhammad* v. *Ala Bakhsh* (9); *Daswandi* v. *Mahant Krishen Dev* (10); and other cases were referred to which are unreported.* The parties in this appeal were, therefore, not governed by Mahomedan law; and if not, it must be by the customary law. So far as women were concerned, the succession has been for life, and no estate larger than one for life whether daughter, widow or sister, and on her death the property has reverted to the male owners, whoever they might be, as reversioners. Even a male owner had a limited power of alienation, and could not give property to one son to the exclusion of another. Reference was also made to the Punjab Land Alienation Act (XIII of 1900), as amended by Punjab Act I of 1907); and the Punjab District Gazetteer, Vol. XIVA, page 96.

(1) (1867) 2 Punj. Rec. 113.
(2) (1883) 18 Punj. Rec. 2.
(3) (1893) 28 Punj. Rec. 321.
(4) (1893) 28 Punj. Rec. 109.
(5) (1893) 28 Punj. Rec. 501.
(6) (1894) 29 Punj. Rec. 482.
(7) (1895) 30 Punj. Rec. 124.
(8) (1903) 38 Punj. Rec. 207.
(9) (1903) 38 Punj. Rec. 54.
(10) (1911) 46 Punj. Rec. 121.

* The unreported cases cited will be found referred to in the judgment of the Chief Court which is reported in 42 Punjab Record (1907), page 1.

Sir R. Finlay, K. C., and *Considine O'Gorman*, for the respondent, contended that the Mahomedan law was the law governing the parties in this case, until it was proved that what was called the customary law was applicable; and no such custom as contended for by the appellants had been established. It was very improbable that the parties had given up their personal law, and there was no presumption that they had done so: any allegation that they had, required very strict proof, and the evidence on the record was insufficient for the purpose. It had not been shown that the gift enured only for Mussammat Zainab's life; and not a single instance had been given of a daughter receiving a gift as she had done, and not being allowed to transfer the subject of it in any way she pleased. No custom had therefore been established by which the property in suit would go to the male heirs (the reversioners) on Mussammat Zainab's death. The parties, as Sheikh Ansaris, were not agriculturists and therefore, presumably, were not governed by any general customary rules applicable to ordinary agriculturists in the Eastern Districts of the Punjab to the exclusion of their personal law. Reference was made to the "Land Systems of British India," by B. H. Baden-Powell, C.I.E., [Ed. 1892] Vol. II, Book 3, "Sytem of Village or Mahal Settlements," part IV, chapter I, section 10, page 566.

Mussammat Zainab was, it was submitted, absolute owner of the property (which in her hands was not ancestral), a gift to her in lieu of dower effecting her absolute ownership. She had power to adopt an heir, being subject to no custom prohibiting such an adoption, and she had exercised that power by adopting the respondent, and her gift to him was valid.

It was also contended that the suit was barred by limitation as had been held by the Chief Court.

1911

MUHAMMAD UMAR KHAN v. MUHAMMAD NIAZ-UD-DIN KHAN.

There had been long adverse possession ever since the death of Mussammat Maryam. There was, moreover, an overwhelming case of acquiescence on the appellant's part in the respondent's possession. The mutation of names had been effected in the respondent's favour in 1888 with the full knowledge of the appellants: their long silence subsequently, and the fact that in 1895 and 1896 some of the land had been partitioned by them and the respondent who was thus treated by them as being the owner, estopped them from now disputing his right to the property.

De Gruyther, *K.C.*, replied contending that the land was all agricultural, and the parties were agriculturists, and governed, not by Mahomedan law, but by custom which was definitely and strictly accepted by them, and had been sufficiently established by the evidence.

The judgment of their Lordships was delivered by

Dec. 14.

SIR JOHN EDGE. This is an appeal from the decree of the Chief Court of the Punjab, dated the 18th of April 1906, reversing the decree of the District Judge of Jullundur, dated the 13th of January 1902, which had decreed the plaintiffs' claim.

The plaintiffs brought this suit on the 11th of May 1900 to obtain possession of certain immovable property, lands and houses, in Basti Danishmandan, in the Punjab, which they claimed as their ancestral property. In their plaint they alleged that the property in question had been held for her life by Mussammat Zainab, by virtue of a gift made to her by her father Sarfraz Khan, an uncle of the plaintiffs, and that on her death on the 4th of May 1899 the right of inheritance in the property devolved upon them as reversionary heirs. They also alleged in

their plaint that Mussammat Zainab had not, in fact, transferred the property to the defendant, and that if she had transferred the property to him such transfer was, by law, according to the custom of the tribe to which the parties belong, and the Rewaj-i-Am, null and void as against the plaintiffs as reversionary heirs.

The defendant by his pleadings alleged title as owner in himself by gift from Mussammat Zainab, alleged that Mussammat Zainab was entitled to the full estate in the property in question, and not merely to an estate for her life, denied that the plaintiffs had any right to the estate, denied that the property was ancestral, denied that any law or tribal custom existed which made the gift to the defendant unlawful or void, and amongst other things alleged that he had been adopted as her son by Mussammat Zainab.

The parties to the suit are Sheikh Ansaris of a Pathan tribe of Punjab Mahomedans. The defendant is in possession of the property in dispute under a gift from Mussammat Zainab made to him in her lifetime. The plaintiffs' case, the only case on which they could have succeeded, is that, according to a custom which they alleged to be existing and binding in their family, no woman could take by gift more than a mere interest for her life without any power of alienation in any ancestral property of the family, and consequently that the gift by Mussammat Zainab to the defendant was void. Many issues, some of which, in the view which their Lordships take of this case, were immaterial or irrelevant, were raised by the parties, and much evidence was recorded. The District Judge of Jullundur gave the plaintiffs a decree for possession. From that decree the defendant appealed to the Chief Court of the Punjab. The

1911

MUHAMMAD UMAR KHAN v. MUHAMMAD NIAZ-UD-DIN KHAN.

Judges in the Chief Court mainly directed their attention to a question of acquiescence, which their Lordships consider did not arise on the facts, and to the alleged adoption of the defendant by Mussammat Zainab, which was an immaterial issue, and having apparently, although somewhat uncertainly, found that Mussammat Zainab had adopted the defendant, they applied article 118 of the Second Schedule of the Indian Limitation Act, 1877, to the case, allowed the appeal, and dismissed the suit with costs.

Although their Lordships consider that the question of an adoption was an immaterial issue, they think it advisable to say that the omission to bring within the period prescribed by article 118 of the Second Schedule of the Indian Limitation Act, 1877, a suit to obtain a declaration that an alleged adoption was invalid, or never, in fact, took place, is no bar to a suit like this for possession of property. Their Lordships need only refer to *Tirbhuwan Bahadur Singh* v. *Rameshar Bakhsh Singh* (1). Under the general Mahomedan law an adoption cannot be made; an adoption, if made in fact by a Mahomedan, could carry with it no right of inheritance.

It may be further observed that, even if an adoption by a Mahomedan was permissible by any valid custom in the Punjab, the Chief Court found that it had not been proved that the parties to the suit belonged to a family to which the Punjab agricultural or other similar restrictive customs must be presumed to apply.

In order to understand the material evidence in this case it is necessary to refer to the pedigree of the plaintiffs. Muhammad Ali Sher, the common ancestor of the plaintiffs, and Mussammat Zainab, had three

(1) (1906) I. L. R. 28 All. 727; L. R. 33 I. A. 156.

sons, one of whom, Jahangir Khan, had by his wife, Mussammat Fatima, a daughter, Mussammat Maryam, who married her cousin, Sarfraz Khan. Alamgir, another son of Muhammad Ali Sher, had three sons, one of whom was Sarfraz Khan, who married his cousin Mussammat Maryam; another son of Alamgir was Shahbaz Khan; and the other son of Alamgir was Siraj-ud-Din, otherwise called Sheraz-ud-Din Khan, who was the father of the plaintiffs. Another son of Muhammad Ali Sher was Sarwar Khan, who had two sons, one of whom was Muhammad Said; the other son of Sarwar Khan was Muhammad Bahadur Khan. Sarfraz Khan had by his wife Mussammat Maryam, a daughter Mussammat Zainab, who married Ghulam Mohy-ud-Din *alias* Baghe Khan. The defendant is a son of Jamal-ud-Din, who was a son of a sister of Sarfraz Khan. Jamal-ud-Din Khan was a brother of Mohy-ud-Din *lias* Baghe Khan.

On the 3rd Ramzan 1248 A.H., Jahangir Khan, by his deed of gift, gave to his daughter Mussammat Maryam, wife of Sarfraz Khan, absolutely all his one-third share of the property of his ancestors which had fallen to his lot according to law, in lieu of the dower of her mother Mussammat Fatima. Mussammat Maryam obtained possession of the property which had been given to her by her father Jahangir Khan, and remained in possession for 15 years, when she gave that property to her husband Sarfraz Khan, who took possession on her death. Mussammat Maryam died in 1846 or 1847. After her death Sarfraz Khan's right to the possession of the property which had come to him from Mussammat Maryam was challenged by Muhammad Said Khan and Muhammad Bahadur Khan, sons of Sarwar Khan, and Sheraz-ud-Din Khan, the father of the plaintiffs, who contested the alienation to Sarfraz Khan, alleging that by custom

1911

MUHAMMAD UMAR KHAN v. MUHAMMAD NIAZ-UD-DIN KHAN.

daughters had no right of succession. Sarfraz Khan brought a suit for maintenance of possession in the Court of the Deputy Collector against Muhammad Bahadur Khan, Muhammad Said Khan, and Sheraz-ud-Din. In that case Sheraz-ud-Din, Shahbaz Khan, and Muhammad Bahadur Khan proved that Mussammat Maryam had been in possession of the property, and had, through the agency of her husband Sarfraz Khan and his brother Sheraz-ud-Din, received the rents of the land together with zamindari dues, and had paid the Government revenue. In that case Muhammad Said Khan testified to the facts of the gift and delivery of possession to Mussammat Maryam, and Sheraz-ud-Din admitted that a deed of gift had been executed and that possession had been delivered to Mussammat Maryam. Several other witnesses, including the marginal witnesses to the deed of gift, proved that the property had remained in the possession of Mussammat Maryam for her lifetime, and had, after her death, passed to Sarfraz Khan, her husband. On the 16th of May 1849, the Deputy Collector ordered that a decree for Sarfraz Khan's claim be passed to the effect that Sarfraz Khan should retain possession of the land then in suit. From that order of the Deputy Collector Muhammad Bahadur Khan appealed to the Settlement Officer, who, on the 3rd of August 1849, dismissed the appeal, holding that the inquiry before the Deputy Collector had established Sarfraz Khan's possession, occupation of, and title to the land, and that if Muhammad Bahadur Khan had any claim to the land he was at liberty to lodge a suit in a Civil Court. No suit was brought in a Civil Court to contest the right or title of Sarfraz Khan to the land which had come to him from Mussammat Maryam. The facts above referred to afford, in their Lordships' opinion, strong evidence that there was no custom applying to this family

which limited the estate in ancestral lands which came to a daughter by gift to a mere life estate, and which prevented a daughter alienating such lands by gift in her lifetime.

On the 15th of December 1851 Sarfraz Khan, who was then in possession of the lands which had come to him by gift from his wife Mussammat Maryam, and was also in possession of his own third share of three shares in the ancestral property which had come to him by lot according to law, made a deed of gift by which he gave to his daughter Mussammat Zainab absolutely his entire property of every kind, and gave her possession. To that deed Shahbaz Khan, son of Alamgir, was one of the witnesses. Sarfraz Khan died on the 10th of May 1852, and on that day the Patwari of Basti Danishmandan, on enquiry of Mussammat Zainab, was directed by her to enter the entire share of Sarfraz Khan, which had come to her, in the official papers in the name of her husband Ghulam Mohy-ud-Din, whose name was accordingly entered on the 10th of May 1852. In or about 1859 Muhammad Bahadur Khan and Muhammad Said Khan brought a suit in the Revenue Court of the extra Assistant Commissioner of Jullundur against Ghulam Mohy-ud-Din, in which they claimed possession of the lands which had come through Mussammat Maryam and Sarfraz Khan to Mussammat Zainab. The plaintiffs in that suit alleged that Sarfraz Khan had not executed the deed of gift in favour of Mussammat Zainab; that the property in suit could not have passed through his wife Mussammat Zainab to Ghulam Mohy-ud-Din, and that as Sarfraz Khan had died without a son the property had vested in them, Muhammad Bahadur Khan and Muhammad Said. In that suit the Patwari of Basti Danishmandan was examined as a witness, and in reply to the question—"In Basti Danishmandan what

1911

MUHAMMAD UMAR KHAN v. NIAZ-UD-DIN KHAN.

custom prevails in respect of an estate left by a sonless proprietor?" said :—

"The following custom prevails :—The estate of a proprietor dying childless goes to his daughters. Should he make a gift of his property during his lifetime in favour of his daughters, they succeed to their father's estate. If he does not make a gift in favour of his daughters during his lifetime, his brothers and brothers' sons succeed to his estate."

Ghulam Mohy-ud-Din gave evidence in that suit ; he claimed no title in himself ; he said that his wife Mussammat Zainab was the proprietor, and that she had full authority to have her own name inserted in the official papers or to allow the entry in his name to stand. Many other witnesses were examined in that suit, and on the 25th of June 1859 the extra Assistant Commissioner of Jullundur dismissed the suit. From that order dismissing the suit Muhammad Siraj-ud-Din (Sheraz-ud-Din Khan), who had apparently come into the suit as a plaintiff, Muhammad Bahadur Khan, and Muhammad Said Khan, appealed to the Deputy Commissioner, who on the 31st of December 1859 rejected the appeal, but, holding that Mussammat Zainab alone was the proprietor, directed that her name should be entered in the column of owners. From the order rejecting their appeal Muhammad Siraj-ud-Din (Sheraz-ud-Din Khan), Muhammad Bahadur Khan, and Muhammad Said Khan appealed to the Commissioner of Jullundur, who on the 25th of February 1860 dismissed their appeal.

On the 6th of May 1887 Baghe Khan (Ghulam Mohy-ud-Din) executed a deed in which he stated that he had adopted Niaz-ud-Din when he was two years old and that he and his wife had brought him up. Niaz-ud-Din, who is mentioned in the deed, is Muhammad Niaz-ud-din Khan, the defendant in this suit.

On the 22nd of May 1888 Ghulam Mohy-ud-Din Khan and his wife Mussammat Zainab executed a

deed of settlement by which Ghulam Mohy-ud-Din gave certain property of his in Basti Danishmandan, which is not in dispute in this suit, to Muhammad Niaz-ud-Din Khan, and Mussammat Zainab gave to Niaz-ud-Din Khan the property which is in dispute in this suit. In that deed it is stated that Muhammad Niaz-ud-Din Khan had been placed in possession. An application was made to enter the name of the defendant Muhammad Niaz-ud-Din Khan in the column of proprietors in respect of the property in dispute in this suit, and Mussammat Zainab having stated to the Tahsildar that Muhammad Niaz-ud-Din Khan was in possession, and no objector appearing, the Tahsildar sanctioned the mutation of names, and the name of Muhammad Niaz-ud-Din Khan was accordingly entered in the column of proprietors.

In 1895 and 1896 the principal lands which had been held in unpartitioned shares by Muhammad Niaz-ud-Din Khan, Muhammad Umar Khan, and Muhammad Pirdad Khan, were by agreement between them partitioned, each having allotted to him lands which represented his share. Muhammad Niaz-ud-Din's shares in the partition represented shares which had come to him by the gift of Mussammat Zainab. Mussammat Zainab was then alive; she died on the 4th of May 1899.

Their Lordships consider that these partition proceedings between Muhammad Umar Khan, Muhammad Pirdad Khan, and Muhammad Niaz-ud-Din Khan, who were the original parties to this suit, afford very strong evidence in favour of Muhammad Niaz-ud-Din, who is the defendant in the suit, and respondent in this appeal. The evidence which was given on behalf of the plaintiffs to prove that a custom existed and applied to this family, by which a female could take only a life interest in the ancestral property which

1911

MUHAMMAD UMAR KHAN v. MUHAMMAD NIAZ-UD-DIN KHAN.

had come to her by gift from her sonless father, and had in such property no power to alienate it by a gift in her lifetime, was of the most shadowy description and failed to prove the custom alleged by them. Evidence as to the limited rights by custom of a widow in her deceased husband's property was not evidence from which the custom alleged by the plaintiffs in this suit could be inferred. Nor was evidence that a Mahomedan father had been prevented by some local custom from giving the bulk of his property to one of his sons, evidence which had any bearing on the issue in this case. The evidence, to which reference has been made by their Lordships, relating to the devolution of Jahangir Khan's share to Mussammat Zainab, is entirely inconsistent with the existence of the custom which has been alleged by the plaintiffs.

Their Lordships find that not only have the plaintiffs failed to prove the custom alleged by them, but the alleged custom has been disproved. They also find that Mussammat Zainab had a full proprietary estate in the property in dispute, and that she made a valid gift of that property to the defendant.

Their Lordships will humbly advise His Majesty that the decree of the Chief Court of the Punjab dismissing the suit of the plaintiffs should be affirmed and this appeal be dismissed with costs.

Appeal dismissed.

Solicitor for the appellants : *Edward Dalgado.*

Solicitors for the respondent : *T. L. Wilson & Co.*

J. V. W

APPELLATE CIVIL.

Before Mr. Justice Caspersz and Mr. Justice D. Chatterjee.

BIRENDRA KISHORE MANIKYA

v.

AKRAM ALI.*

1912

Jan. 4.

Estoppel—Rent-free tank—Sanad—No mention of rent in the sanad—Tenants making improvement by re-excavating tanks, effect of—Inference of landlord's intention to grant rent-free right.

In a suit brought by the landlord to recover possession of a tank with its banks, and in the alternative to have the lands assessed with fair rent, the defendant pleaded that the tank had been *niskar* (rent-free) from a long time by virtue of a *sanad* granted by the predecessor of the plaintiff. The *sanad* was granted in the year 1850 to re-excavate an unclaimed silted-up tank, by which the grantee was required to re-excavate the tank by employing earth-cutters, and the only restriction imposed was that the limits of the ancient tank were not to be exceeded. There was no provision for the payment of any rent in the present or future, and nothing was said as to the duration of the grant. The ancestor of the defendant re-excavated the tank at considerable expense, and it has been in the exclusive possession of the family of the defendant from father to son, and still supplies good drinking water :

Held, that, under the circumstances, the plaintiff was estopped from asserting that the tank with its banks should come under a new liability of, which there was no indication in the previous history of the tank, and that therefore, it could not be assessed with any rent.

Held, *per* Chatterjee J., that according to Hindu *shastras*, digging new tanks and re-excavation of old ones being supremely meritorious, the ancestor of the plaintiff could never have meant that the grant made by the *sanad* was a mere license ; and that the defendant was entitled to hold the tank with its banks without payment of rent as long as the tank served the purpose for which the grant was made.

* Appeal from Appellate Decree, No. 1270 of 1910, against the decree of A. H. Cumming, District Judge of Tipperah, dated Jan. 3, 1910, affirming the decree of Krishna Kumar Sen, Munsif of Comilla dated Dec. 1, 1908.

1912

BIRENDRA KISHORE MANIKYA *v.* AKRAM ALI.

The possession of a party basing his title on a grant, and not on adverse possession as an alternative source of title, cannot be used for any purpose other than for explaining the grant on which he relies.

SECOND APPEAL by the plaintiff, Raja Birendra Kishore Manikya Bahadur.

This appeal arose out of an action brought by the plaintiff for declaration of his zamindary title to a tank and its banks and for *khas* possession, and in the alternative he prayed for assessment of rent. The plaintiff alleged that the disputed tank was his *khas* property and his tenants used to take the water, and their cattle used to graze on the banks; that during the last cadastral survey the defendant set up exclusive possession, and the Settlement Officer recorded him as a settled raiyat, but left the properties unassessed; and that he came to know of the defendant's possession in 1308 B. S., and hence the suit was brought.

Defendant pleaded, *inter alia*, that the suit was barred by limitation; that the plaintiff was estopped from pleading that the tank and its banks were liable to assessment of any rent; and that the properties held by him were *niskar*. It appeared that the ancestor of the defendant having obtained on 26th January 1850 a *sanad chiti* from the then Maharaja Bahadur, re-excavated several silted-up tanks and their banks; and since then defendant's ancestor, and on his death the defendant, have been in possession thereof without any payment of rent.

The Court of first instance having held that the suit was barred by limitation, dismissed the plaintiff's suit. On appeal, the judgment of the first Court was affirmed by the learned District Judge.

Against that decision the plaintiff appealed to the High Court.

Babu Dwarka Nath Chuckerbutty, *Babu Gobinda Chandra Dey Roy* and *Babu Birendra Chandra Dass*, for the appellant.

Babu Shashadhar Roy, for the respondent.

Cur. adv. vult.

CASPERSZ J. The plaintiff is the Maharaja of Hill Tipperah. He also owns what the plaint describes as "a vast zamindari," that is, Chakla Roshanabad in the British district of Tipperah. The suit giving rise to this second appeal was brought by the Maharaja to have his zamindari title declared in respect of a tank and its banks and for *khas* possession and mesne profits. In the alternative, plaintiff claimed to have the lands assessed with fair rent. The defence was that the tank had been *niskar* (rent-free) since the time of the defendant's ancestor in virtue of a *sanad chiti*, dated the 14th *Magh* 1259 (26th January 1850), granted by the predecessor of the plaintiff.

The first Court dismissed the suit on the ground of limitation; and, on appeal, the District Judge has arrived at the same conclusion.

The plaintiff appeals. This is one of many appeals involving the same question—the right to assess the *niskar* tanks in the chakla. We have heard the arguments in this appeal and in appeals from Appellate Decree Nos. 1963, 2515 and 2523 of 1910, which may be regarded as test cases, the result of which, it is said, will govern both the other connected appeals pending in this Court, as also the thousands of suits and appeals that are awaiting disposal in the lower Courts in the districts of Tipperah and Noakhali.

It is argued for the plaintiff-appellant that the *sanad chiti* amounted to a mere license to re-excavate the silted-up tank, and it was revocable by the

1912

BIRENDRA KISHORE MANIKYA v. AKRAM ALI.

CASPERSZ J.

grantor, or, at all events, by his successor in interest: that the tenant never set up any hostile title to, or adversely possessed, the land of the tank, and that the suit was instituted within 12 years from the 25th May 1896, the date of the final publication of the record-of-rights prepared under Chapter X of the Bengal Tenancy Act.

The duty of zamindars to maintain the tanks on their zamindari was plainly pronounced by Their Lordships of the Privy Council in *The Madras Railway Company* v. *The Zemindar of Carvetinagaram* (1):—"The tanks are ancient, and formed part of what may be termed a national system of irrigation, recognised by Hindu and Mahomedan Law, by Regulations of the East India Company, and by experience older than history, as essential to the welfare, and, indeed, to the existence of a large portion of the population of India. The public duty of maintaining existing tanks, and of constructing new ones in many places, was originally undertaken by the Government of India, and upon the settlement of the country has, in many instances, devolved on zemindars, of whom the defendant is one. The zemindars have no power to do away with these tanks, in the maintenance of which large numbers of people are interested, but are charged under Indian Law, by reason of their tenure, with the duty of preserving and repairing them."

The facts of the case from which these remarks are quoted are different from those now under consideration, but the relative rights and obligations of the present parties are similar. The plaintiff, a Hindu Raja, should be slow to depart from the ancient laws and customs regulating the supply of water for the necessary purposes of his tenants.

(1) (1874) 14 B. L. R. 209, 217; L. R. 1 I. A. 364, 385.

The Maharaja did not maintain the tanks in the chakla, consequently, they silted up, and were re-excavated by the tenants concerned under *sanad chitis*, one of which has been produced by the defendant-respondent. This *sanad* provides that the tenant having applied for re-excavating the ancient and unclaimed tank called Nasir Mahomed, an amin was appointed to ascertain the area and boundaries thereof; that the area was ascertained (2 kanis, 2 gundas, 2 karas, 2 krants) of the four banks; that this *chiti* was granted in order that the tenant should construct embankments on the former sites of embankments of the tank lying within the boundaries so ascertained and specified, and that the tenant should re-excavate the tank by means of *matials* (earth-cutters). Nothing was said in the *sanad* about rent being payable either for the watery portion or the area of the four banks of the tank.

The case is clearly not one within the ancient prohibition which, we are told, was in force in the early days of last century, that a rent-free grant was not valid against the heir or purchaser of the grantor. The *sanad* did not confer any rent-free title: admittedly, it was valid to allow a tenant to spend money and re-excavate an old tank: no contrary view is possible. It is likewise clear that a license to do a thing, to effect improvements, cannot be revoked after the improvements have been carried out, for, in such a case, the parties cannot be relegated to their former positions. The *sanad* is merely a piece of evidence showing the intentions of the parties and the nature of the subject-matter. If it had been intended to assess the tank at some future date, some apt and necessary provision would have been made among the terms of the document. If any rent had been previously paid for the tank, or any part

1912

BIRENDRA KISHORE MANIKYA v. AKRAM ALI.

CASPERSZ J.

of it, that fact also would have been mentioned. The grantor is, in the circumstances, estopped from asserting that the subject-matter of his grant should come under a new liability, of which there is no indication whatever in the previous history of the tank. I take it as beyond controversy that the word "tank" includes the banks which are necessary for the enjoyment of the water.

The rule of estoppel stated in *Ramsden* v. *Dyson* (1) was applied by the Judicial Committee in *Ahmad Yar Khan* v. *The Secretary of State for India* (2), where the persons undertaking to construct a canal were deemed to have "acquired a proprietary interest in so much of the Government lands taken for the purpose of the canal as was required for its construction and maintenance, and also a right to have the waters of the Sutlej admitted into the canal so long as the canal was used for the purpose for which it was originally designed." The case of *Ramsden* v. *Dyson* was also approved in *Plimmer* v. *The Mayor, Councillors, &c., of Wellington* (3), where a wharfinger who had spent money on land, on which he had entered under a license, was deemed to have acquired a perpetual right to the same. The Privy Council held that such a license could not, in view of subsequent events, be revoked.

It is also well settled that if a person having a right to avoid a transaction on any legal ground, and being aware of, and reasonably capable of enforcing, such right, manifests an intention to confirm the transaction, he cannot afterwards avoid it: *Wright* v. *Vanderplank* (4) and *Jarratt* v. *Aldam* (5). The

(1) (1866) E. & I. Ap. 129, 170.
(2) (1901) I. L. R. 28 Calc. 693.
(3) (1884) L. R. 9 App. Cas. 699.
(4) (1855) 2 K. & J. 1.
(5) (1870) L. R. 9 Eq. 463.

plaintiff had every opportunity, both before, and particularly in, the settlement proceedings to have the *niskar* tanks assessed with fair rent: he deliberately abstained from so doing. He now comes, but not within a reasonable time.

Again, it is a matter of common knowledge that private owners in this country have, in times past, granted lands for various public purposes; such lands are liable to resumption when the particular purpose has been exhausted. There is, in such cases, a reversion in the grantor. On the finding that these *niskar* properties are still used *as tanks* and not for the purpose of cultivation, or otherwise in opposition to the intentions of the grantor, the time has not arrived for the plaintiff to re-enter or to insist upon the payment of rent.

The plaintiff's suit is, therefore, not maintainable. But it remains to consider and decide the plea of limitation upon which we have heard the arguments of the learned vakils engaged. In my opinion, the District Judge has fallen into error in dismissing the suit on this ground. Article 130 of the First Schedule of the Limitation Act, 1908, provides a period of twelve years within which a suit must be brought for the resumption or assessment of rent-free land, and the period begins to run when the right to resume or assess the land first accrues, In the views already expressed, the plaintiff's right has not yet accrued, He will have his remedy when, if ever, the tank again becomes silted up and is no longer used for the purposes contemplated in the year 1850. Apart from this, when the settlement proceedings were being conducted on the 21st November 1894, the tenant never asserted any right to hold rent-free, for ever, either the tank or its banks. He merely set up his *sanad chiti* and the Revenue officer caused a formal entry to be made that,

1912

BIRENDRA KISHORE MANIKYA v. AKRAM ALI.

CASPERSZ J.

as a fact, the tank with its banks was held rent-free "as not paying rent." There was, in my opinion, no clear and unequivocal assertion of adverse possession by the tenant in this case. And as the obligation to pay rent is a recurring obligation the landlord cannot be barred by Article 130.

In *Beni Pershad Koery* v. *Dudh Nath Roy* (1) it was observed by Lord Davey that a mere notice by a person holding for his life, that he claimed to be holding on a perpetual or hereditary tenure, would not make his possession adverse within the meaning of the Limitation Act, so as to bar a suit for possession on the expiration of his life-tenancy. No such claim was ever advanced by the *niskar* holders in the present litigation. Their contention merely extended to the enjoyment of the tanks, rent-free, for so long as they were required for the legitimate purposes which the parties had in view when the tanks were re-excavated. It is also impossible to conceive of a claim to hold adversely being made in respect of a right to receive rent. That right is not a limited interest; it is, in fact, the entire interest of the landlord. Therefore, the rule adopted in *Ishan Chandra Mitter* v. *Raja Ram Ranjan Chakarbutty*(2) with regard to the dispossession of a landlord, in a limited sense, is not applicable to the present facts: the plaintiff's tenants have not encroached on any lands not covered by the *niskar* tanks.

The case of *Bir Chunder Manikya* v. *Rai Mohun Goswami*(3), to which our attention has been called, originated in the same part of the district (Chakla Roshanabad), but the facts were widely different from those of the present litigation. It is, however, some authority for the plaintiff's contention that

(1) (1899) I. L. R. 27 Calc. 156, 166. (2) (1905) 2 C. L. J. 125.
(3) (1889) I. L. R. 16 Calc 449.

Article 130 really covers cases of resumption under the old Regulations, and does not apply to suits such as these under appeal. It is manifest that the tanks with which we are now concerned were never dissociated from being a part of the revenue-paying properties of the zamindar: and no question of limitation can arise in such a case as this.

The result of this appeal coincides with the decision of Chitty and N. R. Chatterjea, JJ., in an unreported case—S. A. No. 2551 of 1908, dated the 3rd February 1911. The decision on the question of a *belagân* entry in the record-of-rights in S. A. No. 1327 of 1909 (dated the 6th December 1910) is also consistent with that now arrived at. As I decided that case, I may observe that the facts are distinguishable, but that the word *belagân* (not assessed with rent) which has a special significance in Bihar has its counterpart here in the expression *kar dharjya nai*, and means that rent was not imposed in the settlement proceedings.

The decree of the lower Appellate Court is affirmed, but not for the reasons given in the judgment of the District Judge. The appeal is dismissed with costs.

D. CHATTERJEE J. The facts shortly are that in the year 1850 the ancestor of the defendant applied to the then Maharaja of Tipperah for being allowed to re-excavate an unclaimed silted-up tank in the Maharaja's zamindari, Chakla Roshanabad. This permission was given by a *chitti* bearing the Maharaja's seal, and the grantee was required to re-excavate the tank by employing earth-cutters, and the only restriction imposed was that the limits of the ancient tank were not to be exceeded: there was no provision for the payment of anv rent presently

1912

BIRENDRA KISHORE MANIKYA v. AKRAM ALI.

CHATTERJEE J.

or in future, and nothing was said as to the duration of the grant. The ancestor of the defendant re-excavated the tank at a considerable expense, and it has been in the exclusive possession of the family of the defendant from father to son and still supplies good drinking water.

There was a survey and settlement of the Chakla in 1894, and the tank with its banks was numbered as 253 and 252 and included within the *nij jama* of the defendant. The defendant objected that he held both these numbers under a *niškar* title granted by the *chitti* of 1850 which he produced. The Maharaja's agent asserted that the banks of the tank were included in the *jama* of the defendant, but did not say anything as to the tank. The Settlement Officer recorded both numbers as separate from the *jama* and 'not paying rent.' The order of the Settlement Officer is dated the 21st November 1894, The exclusive possession of the defendant continued as before, and no action was taken by the Maharaja until the 25th of February 1908 when he filed the suit giving rise to the present appeal on the allegation that the tank and its banks were his *khas* property and the defendant had no right to retain possession of the same without his consent. He prayed for recovery of possession and in the alternative for assessment of fair rent.

The defendant pleaded *niskar* title under his *sanad*, estoppel and limitation.

The first Court dismissed the suit as barred by limitation, and the learned District Judge not only upheld the decision on the question of limitation, but held that the *sanad* intended to grant a rent-free title.

The Maharaja has appealed mainly on two grounds: *first*, that the *sanad* does not confer a rent-free

title and is at best a license which can be revoked at any time, and, *secondly*, that the suit is not barred by limitation,

I will deal with the *sanad* first: in construing this document it must be borne in mind that it was granted by a Hindu Raja for the re-excavation of an old tank. According to the Hindu sastras the grant of land for digging tanks, the digging of new tanks and wells and the re-excavation of old ones is supremely meritorious.

तड़ागकृन्नित्यतृप्तो वारुणंलोकमश्नुते।

"He who makes a tank, becomes devoid of thirst for all time and enjoys the abode of Varuna." *Visnu*, 61, 2.

यो वापीमथवा कूपं देशे तोयविवर्जिते
खनयेत् स दिवं याति बिन्दौ बिन्दौ शतं समाः।

"Whoever causes the digging of a tank or a well in a place destitute of water, goes to heaven for a hundred years for each drop of water." *Nandi Puran*, quoted by Raghunandan.

कूपाराम तड़ागेषु देवतायतनेषु च
पूर्णःसंस्कारकर्त्ताच लभते मौलिकं फलं।

"In respect of wells, gardens, tanks and temples the repairer gets the same merit as the original maker." *Visnu*, 61, 19.

The great *rishi* Narada when on a visit to the great king Judhistir, asked him :—

* * कच्चित् तुष्टाः कृषीवलाः॥
कच्चिद्राष्टे तड़ागानि पूर्णानिच बृहन्तिच
भागशो विनिविष्टानि न कृषि दैवमातृका।

"Are the cultivators contented? Have you constructed large tanks full of water in proper places

1912

BIRENDRA KISHORE MANIKYA v. AKRAM ALI.

CHATTERJEE J.

in your kingdom? Is agriculture independent of the rains?" *Mohabharat, Savaparba*, Chapter V, 76, 77.

Sukracharya when speaking of the duties of kings says—

तस्य दृष्ट्वा तड़ागं वा वापिकां क्षत्तिमां नदीं कुर्व्वन्त्यन्यत तद्विधं वा कर्षन्त्यभिनवां भुवं तद्व्ययद्विगुणं यावन्न तेभ्यो भ गमाहरेत्

"When any one digs a tank or a canal or does some other similar work tending to the improvement (of his country), or reclaims new land. the king shall not realize any rent for these until double the cost of the work has been realized from the usufruct." *Sukraniti*, IV, 2, 121, 122.

This is when such works are done without permission—

जलाधार करणार्थं भूमिदाने फलमाह चित्रगुप्तः।
जलाशयार्थं यो दद्यात् बारुण्यं लोकमाप्नुयात्। भूमिमितिशेषः॥

"Whoever makes a gift of land for the purpose of making a reservoir of water attains the abode of Varuna" *Visnu Dharmottar*, quoted in Raghunandan's *Jalasayotsargatatwa*.

As a Hindu Raja presumably possessing all the instincts and traditions of a Hindu Raja, it is impossible to conceive that the ancestor of the plaintiff intended anything other than the grant of the land for the purpose of the re-excavation of the ancient tank. He could never have meant to grant a mere license as understood by English lawyers, and a consistent course of conduct makes it quite clear that that was so. It is admitted that it was an ancient tank previously possessed by some one or other of the tenants, for the *sanad* calls it a *be-waris* tank, *i.e.*, one in respect of which there were no claimants as heirs: there is no suggestion that it was ever assessed to

rent; there are no zamindari papers showing that it was ever considered as a part of the rent-paying lands of the mahal: it has come down from father to son for at least sixty years without any claim having ever been made for rent or resumption: even in 1894 during the Settlement operations the Raja's Agent did not even assert that the tank was assessable, and in respect of the banks of the tank merely said that they were parts of the separate holding of the defendant: even after that for over 12 years, *i.e.*, until February 1908, we see no attempt to assess or resume the land. It may be noted that there are hundreds of such tanks in Chakla Roshanabad, possessed by the tenants of the Maharaja in the same manner, some with *sanads* and some without, and in respect of none of them any claim for assessment or resumption has ever been made, and I have no doubt that neither the Maharaja nor the tenants ever understood that these would be ever resumed or assessed to rent, and I am of opinion that the defendant is entitled to hold the tank with its banks without payment of rent, so long as the tank serves the purpose for which the grant was made.

The matter may also be considered in another light: when the former Maharaja granted permission to the ancestors of the defendant to spend an indefinite amount of money for the reconstruction of the tank, he encouraged and created an expectation in the grantee that he would be allowed to enjoy the improved property without any let or hindrance, and his heir the present Maharaja is equitably bound to give effect to such expectation. If that were not so, the Maharaja might evict him at any time after the money had been spent, or demand an impossible rate of rent. This principle was followed by their Lordships of the Privy Council in the case of *Ahmad*

1912

BIRENDRA KISHORE MANIKYA v. AKRAM ALI.

CHATTERJEE J.

Yar Khan v. *The Secretary of State for India* (1) and is eminently applicable to the facts of this case.

In this view of the rights created under the *sanad*, as interpreted by the surrounding facts, the question of limitation does not arise. For so long as the tank continues to be a tank, no assertion of adverse title by the defendant can give the Maharaja a cause of action for resumption or assessment of rent: see *Maharani Beni Pershad Kueri* v. *Dudhnath Roy* (2). Besides, as the defendant relied upon his *sanad* as the root of his title and claimed *niskar* title under the *sanad* and not by adverse possession as an alternative source of title, his possession cannot be used for any purpose other than that of explaining the grant on which he relies: see *Labrador Company* v. *The Queen*(3).

In this view of the case, I agree in dismissing the appeal with costs.

Appeal dismissed.

S. C. G.

(1) (1901) I. L. R., 28 Calc. 693. (2) (1899) I. L. R., 27 Calc. 156.
(3) [1893] A. C. 104, 122.

APPELLATE CIVIL.

Before Mr. Justice Caspersz and Mr. Justice D. Chatterjee.

BIRENDRA KISHORE MANIKYA

v.

ROSHAN ALI.*

1912

Jan. 4.

Limitation—Adverse possession—Rent-free tank—Setting up hostile title to the knowledge of the landlord—Lakhiraj title—Limitation.

In a suit for recovery of possession of a tank with its banks by establishment of plaintiff's zemindari title thereto, and in the alternative for assessment of rent, the defendant pleaded that the tank was rent-free and that the suit was barred by limitation. It appeared that the defendant more than twelve years ago, in the settlement proceedings, claimed the tank as rent-free without any reference to any *sanad*, and the plaintiff's agent denied the claim :

Held, that, inasmuch as a complete hostile right was claimed by the defendant to the knowledge of the plaintiff, and as no suit was brought until more than twelve years after, the suit as framed was barred by limitation.

SECOND APPEAL by the plaintiff, Maharaja Birendra Kishore Manikya Bahadur

This appeal arose out of an action brought by the plaintiff to recover *khas* possession of a certain tank with its banks on establishment of his zemindari title thereto, and in the alternative for assessment of rent. The plaintiff alleged that in his extensive zemindary there are a large number of tanks and waste lands which were all in his *khas* possession; that at the time of the cadastral survey the defendant having wrongly stated the tanks and lands in suit as being

* Appeal from Appellate Decree, No. 2523 of 1910, against the decree of Ashutosh Banerjee, Subordinate Judge of Tipperah, dated April 28, 1910, reversing the decree of Sarat Chandra Bose, Munsif of Comilla, dated June 14, 1909.

1912

BIRENDRA KISHORE MANIKYA v. ROSHAN ALI.

in their possession *niskar* (rent-free), they were, on the 26th February 1896, recorded in their names with the remark that they had *raiyati* right therein, but they were not assessed with rent. Hence the present suit.

The defendant pleaded, *inter alia*, that the tank and its banks were held by them *niskar* (rent-free), and that the suit was barred by limitation. No document in support of their *niskar* right was filed by the defendant.

The Court of first instance over-ruled the objections of the defendant, and decreed the suit. On appeal, the learned Subordinate Judge reversed the decision of the first Court, holding that the suit was barred by limitation, inasmuch as it was not brought within twelve years from the date when the defendant asserted his *lakhiraj* title to the disputed tank and its banks, to the knowledge of the plaintiff's agent, before the Settlement Officer in the settlement proceedings. Against this decision the plaintiff appealed to the High Court.

Babu Gobinda Chandra Dey Roy, for the appellant.

No one appeared for the respondents.

Cur. adv. vult.

CASPERSZ J. This is one of the numerous appeals involving the same question, the right claimed by the plaintiff, the Maharaja of Hill Tippera, to assess the *niskar* (rent-free) tanks situated in his chakla Roshanabad. We have heard the arguments in this appeal and in appeal from Appellate decree Nos. 1270, 1963 and 2515 of 1910, which may be regarded as test cases. The plaintiff's suits have been dismissed in appeal from Appellate decree Nos. 1270 and 1963 of 1910, in which judgment has just been delivered, and this appeal also must fail. The Subordinate Judge

has held the suit to be barred, because it was brought more than twelve years after the defendant's assertion of adverse title before the Settlement Officer on the 26th February 1896. In the opinions already expressed the plaintiff's suit is not maintainable, because his right to assess rent on the *niskar* tanks has not accrued. In the present case (which corresponds with suit No. 399 of 1908 of the first Court) no *sanad chiti* was produced or set up by the defendant; their claim was to hold the tank rent-free in virtue of their ancestral title. In so far as that claim is concerned, it has been found to be hostile, and it must be deemed hostile so long as the tank is used as such. The appeal is dismissed, but without costs, as the respondent does not appear.

D. CHATTERJEE J. In this case the defendant pleaded old ancestral rent-free title and also title by adverse possession. The defendant No. 1, however, stated in his deposition that his ancestor had got this *lakhirai* on payment of *gun*, which is translated as the capitalized value of probable rent; the Courts below have held that the payment of *gun* had not been made out, but that the plea of payment implies that the land was at one time *māl*. That it was once the *māl* of the plaintiff is not denied; and if the payment of *gun* is not proved, the land is still *māl*, unless any title by adverse possession or otherwise has arisen in favour of the defendant. The finding is that the defendant and his predecessors have been in possession without paying any rent for over twelve years: that by itself is not sufficient for basing a valid title in bar of the plaintiff's suit, as there is no finding as to who dug the tank and when and under whose order. There is, however, the settlement *khatyan* showing that about the 26th February 1896 the defendant

1912

BIRENDRA KISHORE MANIKYA v. ROSHAN ALI.

CHATTERJEE J.

No. 1 claimed the land as rent-free, and the plaintiff's agent denied the claim. There was thus a clear claim of *niskar* title unqualified by reference to any document, and a clear denial of the same by the plaintiff's agent. A complete hostile right was claimed to the knowledge of the plaintiff, and no suit was brought until more than twelve years after. I think that this suit, as framed, is clearly barred by limitation and has been rightly dismissed. I agree, therefore, in dismissing the appeal without costs.

S. C. G. *Appeal dismissed.*

CRIMINAL REVISION.

Before Mr. Justice Holmwood and Mr. Justice Sharfuddin.

1912

Jan. 15.

SATISH CHANDRA SARKAR

v.

EMPEROR.*

Security for good behaviour—Return of absconding suspect home on withdrawal of warrant, and residence in his father's house without taking steps to conceal himself to commit an offence—Relevancy of evidence of previous connection with a criminal conspiracy or concealment outside the trying Magistrate's jurisdiction—Ostensible means of subsistence—Support by father possessing substance—Jurisdiction of Magistrate to require a person to give an account of his presence while in another jurisdiction—Criminal Procedure Code (Act V of 1898), s. 109, cls. (a), (b).

Clause (*a*) of section 109 of the Criminal Procedure Code should be read in its entirety. The concealment referred to therein must be with a view to committing some offence.

Where a person, against whom a warrant had been issued, absconded from home for two years, but returned thereto after its withdrawal, and was found living in his father's house, without having taken any particular

* Criminal Revision, No. 1378 of 1911, against the order passed by G. P. Hogg, Offg. District Magistrate of Rajshahi, dated Sept. 26, 1911.

steps to conceal himself for the purpose of committing any offence thereafter, the fact of previous connection with a criminal conspiracy or of present correspondence with criminals outside the Magistrate's jurisdiction, is not relevant under section 109, though it might form the basis of a substantive proceeding under section 110.

A person cannot be called on to furnish security under section 109 in respect of an alleged temporary concealment in his father's house unconnected with any intent to commit an offence, nor with any previous concealment outside the Magistrate's jurisdiction.

As long as a young man, out of employment, is staying in the house of his father, who is a man of substance and able, if necessary, to support him, he cannot be held to be without ostensible means of subsistence.

Where the account a person gives of his presence within the limits of a Magistrate's jurisdiction is satisfactory, *e.g.*, that he has returned to, and is living in, his father's house in strict seclusion on the withdrawal of a warrant against him, he cannot be called upon by such Magistrate to give an account of his presence in any other jurisdiction.

THE facts of the case are as follows. Some two years before the institution of the present proceedings, the petitioner, Satish Chandra Sarkar, was suspected in connection with a dacoity at Haludbari, and his brother's house searched. The petitioner was a leading member of a Samiti at Nattore, and was associated with one Bejoy Chuckerbutty, who was subsequently convicted under the Arms Act. Satish was also suspected of selling the *Jugantar*. A warrant was issued against him in connection with the Howrah Gang case, and he absconded. The warrant was withdrawn on the 15th June 1911, and he appeared in Nattore on the 9th or 10th August, and was found living in the house of his father, who was a man of substance. On the 12th August, a proceeding under section 109 of the Criminal Procedure Code was drawn up against him by the District Magistrate of Rajshahi, in the terms set forth in the judgment of the High Court, and he was arrested, but released on bail.

The case for the prosecution was that the petitioner was concealing himself at Nattore and its vicinity in

1912

SATISH CHANDRA SARKAR v. EMPEROR.

order to avoid observation, that he was connected with an anarchist agitation and conspiracy to commit dacoity and other crimes, and that he had no ostensible means of subsistence, nor could he give a satisfactory account of himself. The petitioner filed a written statement denying the prosecution story, and alleging that he was living openly with his father, a Government pensioner, and two brothers, as members of a joint Hindu family, having considerable landed property and other sources of income. The Magistrate, after taking evidence on both sides, was of opinion that the petitioner was, since his return to Nattore, living in his father's house, and had taken no particular steps to conceal his presence there, but that he had, two years previously, been suspected of complicity in anarchist agitation and had absconded. He also found that, beyond his statement that he was in Calcutta, the petitioner had not disclosed his place of residence during such period, and, further, that he did nothing during the time and was unable to show that, as a member of Hindu joint family, he had been supported from the joint funds, and that neither his father nor his brothers had been examined to prove this fact. The Magistrate accordingly, by his order dated the 26th September 1911, directed the petitioner to execute a bond for good behaviour for one year in the sum of Rs. 500, with two sureties in the like sum, and in default to undergo rigorous imprisonment for the same period. The petitioner, thereupon, moved the High Court and obtained the present Rule.

Babu Manmatha Nath Mukherji, for the petitioner.

Mr. K. N. Chaudhuri and *Babu Srish Chunder Chaudhury*, for the Crown.

Cur. adv. vult.

1912

SATISH CHANDRA SARKAR v. EMPEROR.

HOLMWOOD AND SHARFUDDIN JJ. This Rule was issued calling upon the District Magistrate of Rajshahi to show cause why the order directing the petitioner to execute a bond for Rs. 500, with two sureties of Rs. 500 each, for his good behaviour for one year, under section 109 of the Criminal Procedure Code, and on failure to give security to undergo rigorous imprisonment for one year, should not be set aside on the ground that it does not appear that the petitioner is without ostensible means of subsistence, and that the account he has given of himself is satisfactory. Having given the case our most attentive consideration, we are of opinion that the Rule must be made absolute. The proceeding upon which the order complained of was based was dated the 12th August 1911, and set out that, whereas it was reported that Satish Chandra Sarkar was in Nattore or its vicinity, and was concealing himself in order to avoid observation, and there was reason to believe that he was connected with anarchist agitation and conspiracies for the purpose of committing dacoity and other crimes, and whereas he had no ostensible means of livelihood, and could not give a satisfactory account of himself, he was called upon to execute securities as set out above.

The proceedings were taken under section 109 of the Criminal Procedure Code, and not under section 110, and the ground covered was, on the face of it, in respect of both clauses (*a*) and (*b*) of the section. The officiating District Magistrate, however, dealt with it under three heads, the first being that the accused was concealing himself in order to avoid observation. This, of course, is no offence at all, and the Magistrate held, as he was bound to hold, that the prosecution had not made out its case on this head. But he omitted to notice that what he calls the second allegation against the accused is really a substantive

1912

SATISH CHANDRA SARKAR v. EMPEROR.

and necessary part of the first, if there is to be any order under clause (*a*) of section 109.

The whole clause must be read together, and the object of the concealment must be with a view to committing some offence.

Now, the second allegation is that the accused is connected with anarchist agitation and conspiracies for the purpose of committing dacoity and other crimes. This standing by itself could constitute no ground for a proceeding under section 109, but would properly form the basis of a proceeding under section 110, to which the accused has had no opportunity of answering. It being found that he only returned to his father's house on the 9th of August, and merely secluded himself in the day-time, going out at night for exercise, and that the prosecution had not made out that he was taking any particular steps to conceal himself for the purpose of committing any offence, the fact that he had previously been connected with any criminal conspiracy or might still be in correspondence with any criminals outside the jurisdiction, would not be relevant in a case under section 109. It would have to form the basis of a substantive proceeding under section 110. The connection between the alleged concealment and the accused's history having admittedly failed, the proceeding under section 109 (*a*) necessarily fails also. The District Magistrate may, of course, take any proceedings he is advised under section 110, if he is of opinion that the accused is still a desperate and dangerous character, but he cannot be called upon to furnish any security in respect of an alleged temporary concealment in his father's house unconnected with any intention to commit an offence, nor with any previous concealment which admittedly mu t have been outside the jurisdiction.

We come, therefore, to the consideration of the charge under clause (*b*), which is that he has no ostensible means of livelihood, and that he cannot give a satisfactory account of himself. The learned Magistrate finds against him on both these points, although he finds that the accused is a member of a joint family, that he came straight to his father's house on his arrival in Nattore, and that his father and brother accompanied him to Court. He appears to expect that the father and brother should go into the witness-box and take oath that he is being supported out of joint family funds. Obviously, as long as a young man out of employment is staying in his father's house, and that father is a man of substance, able, if necessary, to support him, he cannot be said to be without ostensible means of subsistence. The use of the word "livelihood" seems to have led the learned Magistrate into error.

We have no hesitation in finding that the accused's father is a very ostensible means of subsistence as long as he keeps his son in his house, and that no further evidence is required.

As regards the account he is asked to give of himself, it would appear that the Magistrate has exceeded his jurisdiction under section 109. The account he gives of his presence in the limits of the Magistrate's jurisdiction is quite satisfactory. He had fled from fear of a warrant directed against him in a specific case. That warrant having been withdrawn three months ago, he has ventured to return to his home, though he keeps himself, as is natural and we think proper, in strict seclusion from curious enquiries.

He cannot be called upon to give any account of his presence in any other jurisdiction, except by the Magistrate who is empowered to take proceedings in that jurisdiction.

1912

SATISH CHANDRA SARKAR v. EMPEROR.

The whole object of this part of the clause is to enable Magistrates to take action against suspicious strangers lurking within their jurisdiction. The greatest criminal in the world is not liable to be questioned as to his presence in his own home, unless there is some specific outstanding charge against him.

We, therefore, hold that the proceeding under clause (*b*) of the section also fails, and the proceedings in this case must be set aside and the accused discharged from his bail, subject to any action the District Magistrate may see fit to take under section 110, but no such proceeding, we may point out, should be taken unless there is evidence that the petitioner is still connected with conspiracies to commit crime or is a desperate and dangerous character at the present time.

The Rule is made absolute, and the proceedings under section 109 are set aside.

E. H. M. *Rule absolute.*

APPELLATE CRIMINAL.

Before Mr. Justice Harington and Mr. Justice Brett.

RATI JHA

v.

EMPEROR.*

1911

Nov 22.

Using as genuine a forged document—Handing over of a forged rent-receipt by accused, in the course of a criminal trial, to his mukhtear—Examination by the mukh ear of a witness thereon—Receipt filed by the Magistrate with the record though not proved—Grant of sanction to landlord's agent not a party to the criminal case—Sanction by successor of Magistrate before whom the forged document was used—Penal Code (Act XLV of 1860), s. 471—Criminal Procedure Code (Act V of 1898), s. 195.

Where the accused, during the course of a criminal trial against him of rioting and theft of crops, handed over to his mukhtear a forged rent-receipt, bearing a counterfeit seal of the landlord, to prove his possession, and the latter put the same to a witness and questioned to him as to its genuineness, but, on the witness alleging that it was a forgery, the trying Magistrate took it, initialled it and placed it on the record :

Held, that there was a user of the document within s. 471 of the Penal Code.

Ambika Prasad Singh v. *Emperor* (1) distinguished.

A sanction granted to the agent of the landlord whose seal was forged is valid, though neither was a party to the criminal case in which the forged document was used.

A sanction granted by the successor of a Magistrate before whom the forged document was used is good in law.

THE appellant, Rati Jha, originally held a jote of 22 bighas in village Rampore Shambota, under a zamindar named Mahmaya Pershad Singh, a portion

* Criminal Appeal No. 579 of 1911, against the order passed by W. H. Vincent, Sessions Judge of Mozaffarpore, dated May 10, 1911.

(1) (1908) I. L. R. 35 Calc. 820.

1911

RATI JHA v. EMPEROR.

of which was mortgaged to one Raj Kishwar Narain. Subsequently the jote was sold in execution of a rent decree against the appellant and purchased by Kishendari Pershad. Raj Kishwar then bought the land mortgaged to him from Kishendari and grew paddy on it. In December 1909 Rati Jha and others were alleged to have gone in a body and cut the crops. Rati was thereupon put on trial under sections 147 and 379 of Penal Code before Mr. Davidson, Deputy Magistrate of Mozaffarpore. In support of his defence that he was still in possession, the purchase by Kishendari being according to his case, *benami* for himself, he produced a rent-receipt purporting to be signed by the landlord and gave it to his mukhtear, who then put it to a witness and asked him whether it was not a receipt granted by the zamindar in favour of the appellant. The witness denied its genuineness, whereupon the trying Magistrate took the document, initialled it and filed it on the record. The rent-receipt bore a counterfeit seal of the zamindar. Sanction to prosecute the appellant under section 471 of the Penal Code was applied for by the latter's agent to, and granted by, Mr. Davidson's successor. The appellant was ultimately committed under the above section and tried by the Sessions Judge of Mozaffarpore sitting with Assessors. He was found guilty and sentenced to five years' rigorous imprisonment, and now appealed to the High Court against the conviction and sentence.

Babu Gour Chunder Pal, for the appellant. The grant of sanction to the landlord's agent, who was not a party to the criminal case, is bad in law: *In the matter of Chandra Kant Ghose* (1). Sanction ought to have been accorded by Mr. Davidson who heard the evidence in the original case. The evidence in the

(1) (1888) 3 C. W. N. 3.

present case does not establish that the document was forged. Next, the facts do not constitute user within section 471 of the Penal Code. The rent-receipt was not given in evidence: see *Ambika Prasad Singh* v. *Emperor*(1). Finally, the sentence is too severe.

Mr. Sultan Ahmed, for the Crown. Sanction was granted to the person whose seal was counterfeited and was, therefore, legal: *Queen-Empress* v. *Subbaraya Pillai* (2); *In re Ram Prasad Malla* (3). Sanction granted by the successor of the Judge or Magistrate before whom the offence was committed is perfectly legal: *Bahadur* v. *Eradatullah Mallick*(4). There is ample evidence of forgery. The rent-receipt was used within section 471 of the Penal Code: see *In re Ramappa Hebbara*(5). The case of *Ambika Prasad Singh* v. *Emperor* (1) is distinguishable.

Cur. adv. vult.

HARINGTON AND BRETT JJ. The appellant in this case was convicted of an offence under section 471 of the Indian Penal Code and sentenced to five years' rigorous imprisonment. The document on which the charge of using a forged document was founded was a receipt for rent, and the occasion on which the appellant used it was at a trial in which he was one of the accused on a charge of rioting. The land in respect of which the riot took place was a piece of land of which he wished to take possession; and, in the course of the hearing of the criminal case against him, the receipt for rent in question was produced by him and handed to his mukhtear, who then handed it to a witness who was asked whether it was a receipt for

(1) (1908) I. L. R. 35 Calc. 820.
(2) (1895) I. L. R. 18 Mad. 487.
(3) (1909) I. L. R. 37 Calc. 13.
(4) (1910) I. L. R. 37 Calc. 642.
(5) (1890) 1 Weir 550.

1911

RATI JHA v. EMPEROR.

rent granted by the landlord in favour of the present appellant, who was then one of the accused at the trial. The witness said it was not genuine; but notwithstanding that statement the document was initialled by the Magistrate who was trying the case, and was filed as one of the documents produced on behalf of the accused. On these facts the appellant was convicted, as has been stated, under section 471 of the Indian Penal Code.

The learned vakil, who appeared on behalf of the appellant in this Court, took four points on behalf of his client: (i) that the trial was bad because the sanction on which it was held was invalid; (ii) that there was nothing to show that the receipt was a forgery; (iii) that the receipt was not *used* within the meaning of the Code; and (iv) that the sentence was too severe.

With regard to the first point, the sanction was granted to the agent of the landlord whose seal was alleged to have been counterfeited on the rent-receipt. The learned vakil argued that the sanction ought to have been granted to a person who was one of the parties to the case in which the receipt was produced, namely, the rioting case. That contention finds no support from any of the provisions of the Code of Criminal Procedure, and we do not agree with it. It appears to us that the landlord, whose seal had been counterfeited, was perfectly entitled to authorize his agent to obtain sanction to prosecute, and to prosecute in respect of the wrong which was done to him by counterfeiting his seal.

Then it is said that the sanction was invalid on another ground, because it was not granted by Mr. Davidson who heard the rioting case, but by his successor. But it has been decided by the Courts that a sanction is valid if granted by the successor in

office of the Judge or Magistrate before whom the offence was committed. The first point taken, therefore, fails.

The second point taken is that there is nothing to show that the receipt was forged. The evidence as to that fact is that of the zamindar himself who comes into the box and pledges his oath that the seal which appears on the rent-receipt is not the seal used in his office. A specimen of his own seal has been produced and a comparison shows that the seal on the rent-receipt produced by the appellant, though it resembles that used by the landlord, differs from it in some small but material points. Further, the landlord says that the genuine receipts granted in his zamindari were on printed forms and this one was a receipt on plain paper. It is argued by the learned vakil that there was another seal which was in use before 1905, and that that seal was affixed on the rent-receipt in question by a deceased karpardaz of the landlord for the purpose of cheating the appellant. Not only is there no evidence that any such seal ever existed, but it is in evidence that there was no seal at all in the zamindari at that time, because the landlord deposes that there was no seal before 1905 when the present seal was procured; and, further, the contention of the learned vakil is open to this observation that, if any other seal was ever used previous to 1905, it was quite easy for the appellant who was before 1905 a tenant of the land to produce receipts bearing the seal which he alleged was in existence then. But no such receipt was produced and the evidence shows that no such seal ever existed. The karpardaz who is alleged to have granted the receipt is dead, and so could not be called to deny the aspersion made on his character.

The third contention is that the receipt was not *used*. What happened was that the receipt was

1911

RATI JHA v. EMPEROR.

produced by the mukhtear of the accused and handed to a witness and, though that witness did not prove it, it nevertheless went on to the file after being initialled by the trying Magistrate. It appears to us that this constituted a user. The learned vakil cited the case of *Ambika Prasad Singh* v. *Emperor* (1) as an authority for the proposition that the filing of a document is not a user within the meaning of the Act. But the case he cited, when the judgment comes to be looked at, does not support that proposition. That case was one in which the receipts which were alleged to be forged were entered in a list, and it appears from the report that what was filed was this list of the documents, with a statement made on behalf of a third party. The filing of a list of documents is not the same thing as the filing of the documents themselves. There was no filing of the forged document in that case which would bring the accused within the Act. In the present case the document was tendered to the witness, and then it was initialled by the trying Magistrate and placed on the file by him, after having been handed to the mukhtear by the appellant himself for the purpose of being used in the case. In our view, that is a sufficient user, and the conviction under section 471 of the ndian Penal Code is right and cannot be disturbed.

As to the fourth question, we think that the sentence may properly be reduced. The offence is no doubt a serious one, because it is an offence which must have been committed after preparation and not under pressure or sudden impulse. But, on the other hand, it is to be observed that the document was produced in the course of a criminal trial in which the appellant was one of the accused, and the primary intention which he had was to get out of the difficulty

(1) (1908) I. L. R. 35 Calc. 820.

which he had got into in consequence of the riot, and the circumstance that the document was not supported by the production of perjured evidence of its genuineness may be taken into account in mitigation of punishment. On these grounds, we think the sentence may, with propriety, be reduced, and we reduce it from five years' rigorous imprisonment to three years' rigorous imprisonment. Subject to this modification in the sentence, the appeal will be dismissed.

E. H. M. *Appeal dismissed.*

CRIMINAL REVISION.

Before Mr. Justice Holmwood and Mr. Justice Sharfuddin.

BAISNAB CHARAN MAJHI

v.

GATINATH MUNSHI.*

1912

Jan. 18.

Jalkar—Dispute concerning jalkar—Jurisdiction of Magistrate to institute proceedings under s. 145 of the Code after an order binding down one of the parties to keep the peace—Order attaching the subject of dispute on being unable to determine the question of possession—Criminal Procedure Code (Act V of 1898), ss. 107, 145, 146.

The Magistrate has jurisdiction to take proceedings under s. 145 of the Criminal Procedure Code, after an order under s. 107 of the Code binding down one of the parties to keep the peace, when the circumstances so require.

Where there was a reasonable apprehension that several persons, who were interested in the subject of dispute and had absconded at the time of the s. 107 proceeding, might cause a breach of the peace with the first party, who were fishermen, or that the latter might seek to enforce their rights against the second party who had been bound down, in which

* Criminal Revision No. 826 of 1911 against the order of A. L. Gupta, Deputy Magistrate of Magura, dated May 4, 1911.

1912

BAISNAB CHARAN MAJHI v. GATINATH MUNSHI

case the order binding them down would have the effect of ousting them from any possession they might have:—

Held, that the Magistrate acted properly in instituting proceedings under s. 145 of the Code, in order to determine which party was in actual possession of the disputed properties, and was justified in attaching the same, under s. 146, if he found himself unable to determine the question of possession.

THE facts of the case were shortly as follows. Numbers 1 to 16 of the first party and Nos. 1 to 5 of the second party were $\frac{2}{3}$ anna and $\frac{1}{3}$ anna co-sharers, respectively, in a certain *bheel*, *doba* and *khal* in Sripur, in the district of Jessore. The petitioners, who were fishermen, and some 18 others were tenants of the first party, and Nos. 6 to 11 of the second party were tenants of the latter. Each party claimed exclusive possession of the disputed waters. It appeared that there had been considerable litigation, civil and criminal, between them in respect of these properties. On the 9th December 1910, the second party were bound down, in a proceeding under s. 107 of the Criminal Procedure Code, to keep the peace for one year, upon the application of the petitioners. Certain other persons, who were interested in the subject-matters of the dispute, were, however, absconding at the time of these proceedings.

Upon the receipt of a police report, dated the 17th December 1910, the Sub-divisional Officer of Magura instituted proceedings under s. 145 of the Code between the parties on the 23rd February 1911. He found that there was a likelihood of a breach of the peace between them, but being unable to determine on the evidence, oral and documentary, which party was in actual possession of the subject of dispute, he attached the same under s. 146 of the Code by his order dated the 4th May 1911. The petitioners, thereupon, moved the High Court and obtained the present Rule.

Babu Narendra Kumar Bose, for the petitioners.

Babu Manmatha Nath Mukherjee and *Babu Kumar Sankar Roy*, for the opposite party.

HOLMWOOD AND SHARFUDDIN JJ. This was a Rule calling upon the District Magistrate and the opposite party to show cause why the order attaching a certain *jalkar* should not be set aside, on the ground that the Magistrate had no jurisdiction to proceed, after all the members of the second party had been bound down under section 107 of the Criminal Procedure Code, on the 9th December 1910, in a prior proceeding.

The proceedings under section 145 were taken on the 23rd February 1911, and the order complained of was passed on the 4th May 1911, and the Magistrate finding it impossible to determine who was in possession of the *jalkar* attached the property under section 146. Now, it would be impossible for us to say that in no case can the fact that one party had been bound down to keep the peace under section 107 leave the Magistrate any jurisdiction to act under section 145 when the circumstances so require, and we cannot see our way to making this Rule absolute without laying down such a general proposition. Certainly on the facts of this case it was quite open to the Magistrate to hold that there was a probability of a breach of the peace in respect of the possession of this *jalkar*, even although the members of the second party had been bound down. There were many persons who are said to be interested in the *jalkar* who absconded at the time of the 107 proceeding. The second party say that they have a reasonable apprehension that these persons may, by claiming rights in this *jalkar*, cause a breach of the peace with the first party, who are admittedly fishermen; or the first party, being fishermen, may very naturally

1912

BAISNAB CHARAN MAJHI v. GATINATH MUNSHI.

seek to enforce their rights against the second party who have been bound down, in which case the order binding down the second party will have the effect of ousting them from any possession which they may have.

It would seem that in this state of facts the right course for the Magistrate to take would be the course he has taken, namely, to try and discover who is in actual possession of this *jalkar*. He finds himself unable to do so, and he, therefore, properly exercises his jurisdiction under section 146. The fact that the order under section 107 of the Criminal Procedure Code expired in December 1911 does not, of course, in any way affect the legal aspect of the case, but it certainly renders us less disposed in the exercise of our discretion to interfere with any measure that the Magistrate has thought it necessary to take for the preservation of the peace in his district. The Rule is discharged.

E. H. M. *Rule discharged.*

ORIGINAL CIVIL.

Before Mr. Justice Fletcher.

RAMGOPAL JHOONJHOONWALLA

v.

JOHARMALL KHEMKA.*

1912

Jan. 19.

High Court, jurisdiction of—Revisional jurisdiction—Error by Small Cause Court on a question of limitation—Civil Procedure Code (Act V of 1908), s. 115—Limitation.

An error by the Small Cause Court on a question of limitation, does not justify the interference of the High Court under s. 115 of the Civil Procedure Code.

Amritrav Krishna Deshpande v. *Balkrishna Ganesh Amrapurkar* (1), *Sundar Singh* v. *Doru Shankar*(2), and *Amir Hassan Khan* v. *Sheo Baksh Singh*(3) referred to.

ON the 1st April 1909, Ramgopal Jhoonjhoonwalla brought a suit in the Court of Small Causes in Calcutta, being suit No. 6581 of 1909, against Joharmall Khemka and others, claiming the sum of Rs. 243-11 as brokerage in respect of certain contracts, passed between the 24th January and the 28th March 1907. This suit was withdrawn on the 14th September 1909, liberty being given to the plaintiff to bring a fresh suit on the same cause of action. In exercise of this liberty, on the 28th August 1911, the plaintiff brought a fresh action, being suit No. 18463 of 1911, for the same sum of Rs. 243-11, against Joharmall Khemka alone. It was alleged in the plaint "that the plaintiff's claim was not barred by

* Original civil motion.

(1) (1887) I. L. R. 11 Bom. 488, 492. (2) (1897) I. L. R. 20 All. 78.
(3) (1884) I. L. R. 11 Calc. 6.

1912

RAMGOPAL JHOONJHOONWALLA v. JOHARMALL KHEMKA.

limitation, as his cause of action against the defendant had arisen in September 1909, and also because of the admission and acknowledgment made by the defendant in his written statement in suit No. 6581 of 1909 in the Court of Small Causes of Calcutta." On the 19th September 1911, the plaintiff's claim was decreed by the 2nd Judge of the Small Cause Court. The defendant's application for a new trial was dismissed. Thereupon, the defendant applied for and obtained a Rule from the High Court calling upon the plaintiff to shew cause why the decree of the 19th September 1911 should not be set aside under the revisional jurisdiction of the High Court as laid down in section 115 of the Code of Civil Procedure.

Mr. Sircar, shewing cause against the Rule. Assuming that the Small Cause Court was wrong, an error on a question of limitation does not fall within the purview of section 115 of the Civil Procedure Code, so as to invoke the revisional jurisdiction of the High Court: *Amritrâv Krishna Deshpande* v. *Bâlkrishna Ganesh Amrapurkar* (1), *Sundar Singh* v. *Doru Shankar* (2). In *Amir Hassan Khan* v. *Sheo Baksh Singh* (3), the Privy Council held that an error in law did not fall within the scope of the section in the then existing Code, corresponding with the present section 115.

Mr. S. C. Mukerjee, in support of the Rule. The Small Cause Court acted beyond its power, and the High Court has jurisdiction to interfere under section 115. The High Court has inherent power to interfere. Section 3 of the Limitation Act is mandatory in its terms, and the High Court should interfere. The decisions under sections 115 of the Civil Procedure

(1) (1887) I. L. R. 11 Bom. 488, 492. (2) (1897) I. L. R. 20 All. 78.
(3) (1884) I. L. R. 11 Calc. 6.

Code show how extensive its scope is. The Privy Council case cited dealt broadly with errors in law, and not expressly with the question of limitation.

FLETCHER J. This is an application by the defendant to set aside the order passed by the Small Cause Court of Calcutta. The plaintiff sues in respect of certain items which on the plaint appeared to have been barred by limitation. But the plaintiff sets out in the plaint that his claim was not barred by limitation, as his cause of action had arisen in September 1909, and also because of the acknowledgment made by the defendant in his written statement in suit No. 6581 of 1909. It has been admitted for the purpose of this argument by Mr. Sircar, who shews cause on behalf of the plaintiff, that the decision on the question of limitation was wrong. I think, so far as one can gather from the records and papers, the Court did make a mistake; apparently the case was barred by limitation. That is not the point here. The point is, has the Court jurisdiction to interfere, under section 115 of the Civil Procedure Code, 1908, on the ground that the Small Cause Court acted in the exercise of its jurisdiction illegally or with material irregularity? The point made by Mr. Mukerjee is that section 3 of the Limitation Act casts upon the Court the duty of dismissing all suits barred by limitation. Therefore the Small Cause Court, having gone wrong on the question of limitation, acted with material irregularity or illegality in not dismissing the suit. In my opinion that is not so.

Mr. Sircar referred me to three cases. One is *Amritráv Krishna Deshpande* v. *Bálkrishna Ganesh Amrapurkar* (1). The failure to decide on a question

(1) (1887) I. L. R. 11 Bom. 488, 492.

1912

RAMGOPAL JHOONJHOONWALLA v. JOHARMALL KHEMKA.

FLETCHER J

of limitation does not justify a superior Court in interfering any more than if the whole case is wrongly decided. Then he refers to *Sundar Singh* v. *Doru Shankar* (1), where the Bombay case (2) is followed, and a similar view is taken by the Privy Council in *Amir Hassan Khan* v. *Sheo Baksh Singh* (3). This being so, I cannot interfere in this matter under section 115 of the Civil Procedure Code. The Rule, therefore, is discharged with costs.

Rule discharged.

Attorney for the petitioner : *K. N. Dey.*

Attorney for the opposite party : *G. C. Dey.*

J. C.

(1) (1897) I. L. R. 20 All. 78. (2) (1887) I. L. R. 11 Bom. 488.
(3) (1884) I. L. R. 11 Calc. 6.

CRIMINAL REVISION.

Before Mr Justice Holmwood and Mr. Justice Sharfuddin.

1912

Jan. 22.

ATIAR RAI

v.

EMPEROR.*

Local inspection—Results of inspection not recorded at the time but embodied in the trying Magistrate's judgment—Effect of omission of contemporaneous record—Facts so found not impugned before the Appellate Court—Legality of the conviction—Prejudice.

A Magistrate trying a case may view the place of occurrence in order to follow or understand the evidence, but he should be careful not to allow any one on either side to say anything to him which might prejudice his mind one way or the other.

* Criminal Revision No. 1383 of 1911 against the order of G. J. Monahan, Sessions Judge of Shahabad, dated Sept. 23, 1911.

In re Lalji (1) approved of.

There is nothing in the Criminal Procedure Code to prevent a Magistrate from holding a local investigation for the purpose of elucidating any matter in dispute, and in so far as it conforms to the provisions of the law of evidence it cannot be excluded.

He should place on record the results of the local investigation, but it is not a positive rule of law that a note thereof must be made on the spot.

Where the facts established by the local investigation are impugned, and there is no contemporaneous record of them, the Appellate Court cannot act on them ; but if they are not impugned, the Court cannot exclude them from consideration, because there is no such record, when the accused is not prejudiced by the irregularity.

Joy Coomar v. *Bundhoo Lall* (2) followed.

Babbon Sheikh v. *Emperor* (3), *Girish Chunder Ghose* v. *Queen-Empress* (4) distinguished.

Where the defence suggested that the alleged place of occurrence, a mound of earth, was not scaleable, nor large enough to accommodate the number of assailants said to have been present, upon which the trying Magistrate inspected the locality and found the facts against the accused, but made no separate note thereof on the record at the time, though he embodied them in his judgment, and they were not impugned before the Appellate Court, but it was sought to exclude them on the ground of the omission of such note :—

Held, that the omission of the Magistrate to record a note of the results of the local inspection at the time had not prejudiced the accused, and that the conviction was not bad on that ground.

THE petitioners, Atiar Rai and others, were placed on trial before the Sub-divisional Officer of Bhabua, charged under ss. 147, $\frac{323}{149}$ and $\frac{325}{149}$ of the Penal Code, and convicted and sentenced, on the 27th July 1911, some to rigorous imprisonment for six months, and the others to a fine, and they were further bound down to keep the peace under s. 106 of the Criminal Procedure Code. The case of the prosecution was that, on the 4th April 1911, some head of bullocks trespassed into the yard of the malik of village Manihar, and Jhingur Tewari, a servant of the malik,

(1) (1897) I. L. R. 19 All. 302.
(2) (1882) I. L. R. 9 Calc. 363.
(3) (1910) I. L. R. 37 Calc. 340.
(4) (1893) I. L. R. 20 Calc. 857.

1912

ATIAR RAI v. EMPEROR.

proceeded to impound them, whereupon 15 men, including the petitioners, came up armed with *lathies* and attacked him. He ran back to a *kote*, or a mound of earth, on which the malik's cutcherry stood, pursued by the mob. Sheoparsan Rai, a tehsildar, and others remonstrated with the assailants, and were beaten on the *kote*.

The defence story was that some head of cattle belonging to two of the prosecution witnesses trespassed into the field of Sambhu, who, with the help of Atiar, was taking them to the pound, when they were beaten by 10 or 12 men of the opposite party and the cattle rescued.

The Magistrate examined six eye-witnesses on the side of the prosecution and three on that of the defence. As one of the defence witnesses, a village chowkidar, had deposed that the sides of the *kote* were too steep to be climbed, and the space on the crest too small to accommodate the alleged number of assailants, the trying Magistrate visited the spot, on the 23rd August, and found that the *kote* was easily accessible, there being only a slight slope on the south and practically level ground on the north, from which side the party of the accused came, and also that it was wide enough to accommodate twice their number. He made no separate note of the facts so observed by him at the time, but embodied them in his judgment delivered four days later. He disbelieved the defence and convicted the accused.

The petitioners appealed against their conviction and sentences to the Sessions Judge of Shahabad, who, by his order, dated the 23rd September 1911, dismissed the appeal, holding the prosecution case to be satisfactorily proved by the prosecution witnesses. Before the Judge it was urged not so much that the *kote* was inaccessible and could not accommodate the number

of the accused, but rather that the prosecutor's party could have escaped without being assaulted at all, and that the story of the assault was, therefore, improbable. It was also contended that the Magistrate should have made a contemporaneous record of his observations on inspection, and that they could not be considered by the Court in the absence of such record. The learned Judge referred to the findings of the Magistrate on the local inspection, and disbelieved the village chowkidar, partly on these findings, and partly on the admission by the latter, in cross-examination, that his denial of any occurrence on the *kote*, as stated in his examination-in-chief, was false. The Judge was of opinion that the omission to make a contemporaneous note of the facts observed by the Magistrate was an irregularity, but that it had not prejudiced the accused.

The petitioners, thereupon, moved the High Court and obtained the present Rule.

Babu Dwarka Nath Mitter and *Babu Manindra Nath Banerjee*, for the petitioners.

Babu Srish Chunder Chowdhury, for the Crown.

Cur. adv. vult.

HOLMWOOD AND SHARFUDDIN JJ. This was a Rule calling upon the District Magistrate of Shahabad to show cause why the conviction of the petitioners should not be set aside on the ground that the lower Court inspected the place where the offence is said to have been committed and did not record a note of what he saw.

Now, what happened in this case was this. The defence urged that the sides of the *kote* or mound on which the assault took place were unscaleable, and the space was not sufficient to hold so many persons. This

1912

ATIAR RAI v. EMPEROR.

being a point on which the Magistrate says he could satisfy himself, he visited the place on the 23rd of July, and found, as he puts it, that his trouble for the defence had been wasted; there was no question of the place being inaccessible, it was merely a slight slope on the south, and on the north it was practically on a level with the village, while as for the place of assault it was sufficient to hold twice the number of persons.

The learned Judge in appeal, in dealing with this point, briefly recapitulated the above findings, and says that the Magistrate visited the spot as these were points that could be verified by a local enquiry. Before the Judge it was urged that the Magistrate had made no note at the time of his local inspection. This, the Judge says, he certainly should have done. However he had embodied the result of his inspection in his judgment, which was delivered only four days later, and when what he saw must have been fresh in his memory. Thus in the Judge's opinion his omission to make a note at the time, though irregular, cannot be said to have caused any failure of justice.

In this we fully agree, and the only question we have to consider is whether in all cases the omission to place on the record the results of a local inspection is a fatal error of jurisdiction apart from any prejudice which it may cause to the accused.

We do not find any authority for such a proposition. The case relied on by the learned vakil who obtained the Rule is that of *Babbon Sheikh* v. *Emperor*(1). But none of the judgments delivered in that case consider or deal with the ruling in the case of *Joy Coomar* v. *Bundhoo Lall* (2), though that case was cited in argument for another reason. That ruling imports a reason for giving evidentiary value

(1) (1910) I. L. R. 37 Calc. 340. (2) (1882) I. L. R. 9 Calc. 363.

to local inspections which seems to have been overlooked in subsequent decisions. What those reasons are we shall deal with later on. But what we desire to point out here is that there are in effect three different kinds of local inspections—

(i) Those that are authorised or directed by the Code of Criminal Procedure, and which are governed by the rules and limitations imposed by the Code itself.

(ii) Those which are in the nature of the view by the Jury laid down in section 293 of the Code.

Magistrates having the functions of both Judge and Jury in cases decided by them may, in our opinion, view the place in any case, in order, as the rulings on the point say, to follow or understand the evidence. We are fortified in this opinion by the ruling of *In re Lalji* (1). It is, as the Judges there say, not only not objectionable, but in many cases highly advisable, that a Magistrate trying a criminal case should himself inspect the scene of the occurrence, in order to understand fully the bearing of the evidence given in Court. But if he does so, he should be careful not to allow any one on either side to say anything to him which might prejudice his mind one way or the other. This is the same rule which is applied in the Code itself to the inspection by the Jury.

(iii) But there is a third class of local inspections under which we think the present and very many other cases fall, and that is the class referred to in the ruling in *Joy Coomar* v. *Bundhoo Lall* (2) abovementioned.

There is express provision for these local investigations in the Code of Civil Procedure, but there is nothing that can be deemed to prevent them in the

(1) (1897) I. L. R. 19 All. 302. (2) (1882) I. L. R. 9 Calc. 363.

1912

ATIAR RAI v. EMPEROR.

Code of Criminal Procedure, and in so far as they conform to the provisions of the law of Evidence, it is obvious they cannot be excluded.

Now, we desire to draw particular attention to what the Judges say as to the evidentiary value of such local inspections. They say: "The District Judge also appears to have been of opinion that the results of the enquiry, conducted by the Munsif in this case, could not be considered by him, because it was not evidence according to the definition of that word in the Evidence Act. He is perhaps right in this view. The definition of the word 'evidence,' as given in the Evidence Act, means and includes (*a*) all statements which the Court permits or requires to be made before it by witnesses in relation to matters of fact under enquiry: such statements are called oral evidence; (*b*) all documents produced for the inspection of the Court: such documents are called documentary evidence. The result of a local enquiry by a presiding judicial officer does not come under either of these two heads; but the District Judge has not taken into consideration the definition of the word 'proved' which comes immediately after. It is to this effect: 'A fact is said to be proved when, after considering the matters before it, the Court either believes it to exist or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists.' It would appear, therefore, that the Legislature intentionally refrained from using the word 'evidence' in this definition, but used instead the words 'matters before it.'" The Judges then proceeded to hold that the Appellate Court cannot exclude the personal observations of the lower Court from its consideration. Whether there are good grounds for accepting the results of the local investigation as correct, or rejecting it as

incorrect, are matters with which the High Court in second appeal (and, we may add, also in revision) has nothing to do. It is for the Appellate Court to decide these questions. In this very case the Judges for the first time emphasize the importance of putting upon paper the result of the investigation when completed. "It is very desirable," they say, "that judicial officers conducting local investigations should place upon record the results of their investigations as soon as they are completed, so that the parties may have an opportunity of seeing what the facts are which the judicial officers consider to be established by the local investigations." But where none of those facts are impugned as incorrect, the Appellate Court cannot exclude them from his consideration. It would seem to follow that if they are so impugned and there is no contemporaneous record of them, the Judge would not be able to act upon them, but it is certainly not a positive rule of law that a note must be placed on the record on the spot. In this case none of the objections that have been taken in the various cases cited in this Court apply. The defence practically said: "The mound itself is our witness; go and look at it." The Magistrate went and saw that it was a witness against them. His finding was not impugned before the Judge, but it was sought to exclude this most relevant and important matter before the Court on the mere technical ground that the observation was not made matter of record on the spot. The Judge considered the points, and rightly considered it, from only two points of view —*first*, whether the fact observed was correct; *second*, whether the defence had been in any way prejudiced— and he found that the correctness of the finding was not impugned and that there was no prejudice in the irregularity in omitting to record a note at the time. The present case is clearly not touched by the decision

1912

ATIAR RAI v. EMPEROR.

in *Babbon Sheikh* v. *Emperor* (1). There are no doubt passages in the judgment of Woodroffe J. which might seem to imply that the observation of a fact by the Magistrate could not be admitted. But a careful perusal of the judgment as a whole shows that what is meant is that mere observation cannot be allowed to override the necessity of evidence, and a case cannot be decided merely on observation made by the Court locally. If in looking at a place, in order to understand the evidence, the Magistrate thereby understands that the description of the place given in the evidence is erroneous or false, he is certainly not precluded by the laws of Evidence from holding that the facts, as stated by the witnesses who gave that erroneous or false description, are not proven, and in so holding he does not make himself a witness but acts as a Judge deciding on matters before him. We have shown that the judicial system in this country, of which the Evidence Act is a most important factor, gives the Court power to adjudge the existence of facts on matters before it as well as according as they are deposed to on the evidence. To hold otherwise would be in direct conflict with *Joy Coomar* v. *Bundhoo Lall* (2), which, as far as we know, has never been dissented from. Woodroffe J. clearly shows that the danger to be guarded against is the supersession of all evidence by mere observation, and the head-note of the case appears to us to go too far in saying that the Magistrate cannot import into the case matters or facts which he has himself observed, if that is what is intended. But the use of the word "import" and the words "other matters" leave it doubtful what is intended. No such words occur in either of the concurrent judgments which govern the decision, and the words that do occur are those cited

(1) (1910) I. L. R. 37 Calc. 340. (2) (1882) I. L. R. 9 Calc. 363.

in the next paragraph of the head-note, with which we fully agree, that a Magistrate cannot import into his judgment matters of opinion and inference based on circumstances not on the record.

The case of *Girish Chunder Ghosh* v. *Queen-Empress* (1) is one which, we may observe, has nothing to do with local investigations made after hearing evidence by a trying Magistrate. Upon it is based a contention in this and similar cases that a Magistrate constitutes himself a witness by holding a local inspection in a case in which he is the presiding Judge. The facts of that case clearly show that the District Magistrate who had seen the occurrence and was the best witness for the prosecution constituted himself the Judge for the trial of the case, and the decision was that a witness could not be a judge in the case, inasmuch as it is impossible that a Magistrate can be a witness in a case in which he is the sole judge of law and fact. In other words, a man who is *à priori* a witness to an occurrence cannot assume jurisdiction which he might otherwise have to decide on the facts of that occurrence as a judge. But as local inspections are recognised by the law, and as the Magistrate must make observations of fact in such an inspection and cannot, as Chatterjee J. points out, fail to believe the testimony of his own senses, it is clear that by making such observations he cannot constitute himself a witness in the case. As long as he is a witness he cannot be a judge, and as long as he is a judge he cannot be a witness. If he is a witness, he ousts his own jurisdiction. If he is a judge, he may adjudicate on all matters before him which require proof and in doing so he may use his eyes as well as his ears. We do not for one moment desire to minimize the importance of making a note

(1) (1893) I. L. R. 20 Calc. 857.

1912

ATIAR RAI v. EMPEROR.

of what is observed at a local inspection, nor to in any way appear to condone the introduction either into the report or the judgment of matters of opinion and inference depending on the facts observed. But if the facts observed support or rebut the evidence adduced by either side and cause the Court to understand that that evidence is true or false, inaccurate or exaggerated, then the statement that the facts observed negative or support any of the evidence in the case is not a matter of opinion or inference, but a matter of observation, and it is in our opinion the duty of the Judge, as laid down in *Joy Coomar* v. *Bundhoo Lall* (1), to consider the results of such observation and state them in his judgment. Here the case is clearly one where direct observation explained and cleared up a doubt which had been thrown on the prosecution evidence by the allegations of the defence, and there was clearly no impropriety in the course of the inspection nor in the way in which its results were used. The Rule must, therefore, be discharged.

E. H. M. *Rule discharged.*

(1) (1882) I. L. R. 9 Calc. 363.

ORIGINAL CRIMINAL.

Before Mr. Justice Woodroffe.

EMPEROR

v.

SALIMULLAH.*

1912

Jan. 23.

High Court, jurisdiction of—Jurisdiction of the High Court to try a Native Indian seaman for an offence committed on board a British vessel on the high seas—Stoppage of the vessel thereafter at intermediate ports—Accused brought to Calcutta in custody—Applicability of English law to the offence and the charge, and of Indian law to the procedure and sentence—Courts (Colonial) Jurisdiction Act (37 & 38 Vict., c. 27), s. 3—Merchant Shipping Act (57 & 58 Vict., c. 60), ss. 684, 686.

The High Court of Calcutta has jurisdiction, in its Original Criminal Side, under sections 684 and 686 of the Merchant Shipping Act (57 & 58 Vict., c. 60), to try a Native Indian seaman for murder or manslaughter committed on broad a British vessel on the high seas, who is brought to Calcutta under custody, notwithstanding that the vessel touched, after the commission of the offence, at intermediate ports in the course of the voyage.

The offence should be tried, and the charge framed, under the English law, but the procedure at the trial and the sentence must be regulated by the law of India.

Section 3 of 37 & 38 Vict., c. 27, does not deal with the trial of the case, but with the sentence after conviction.

Queen-Empress v. *Sheik Abdool Rahiman* (1) and *King-Emperor* v. *Chief Officer of the "Mushtari"* (2) dissented from.

THE prisoner, Salimullah, was tried at the sixth Criminal Sessions of the High Court on the 23rd January 1912. He was a Native Indian subject and employed as a fireman on board the *Clan Lamont*, a British ship, on the voyage from Liverpool to Calcutta. It appeared that, on the 16th December 1911, at 5 A.M., while the vessel was proceeding in the

* Original Criminal Jurisdiction.

(1) (1889) I. L. R. 14 Bom. 227 (2) (1901) I. L. R. 25 Bom. 636.

1912

EMPEROR v. SALIMULLAH.

Red Sea, the 2nd Engineer, William McCrea, asked the prisoner to clean the furnace. The latter replied that he would do so after he had taken a drink of water from a can which he took up for the purpose, but the deceased insisted on his doing the work first. Salimullah refused to comply with the order, whereupon McCrea abused him, snatched away the water can from his hands, caught him by the neck and kicked him. The prisoner thereupon picked up a shovel lying near him and struck the deceased with it, causing a fracture of the skull, from the effects of which he died next morning. The vessel arrived at Perim on the evening of the 17th, and the local Health Officer held the *post mortem* examination. On the next day an enquiry was made by a Magistrate on board, and the Health Officer was examined as witness in the presence of the prisoner who declined to cross-examine him. The vessel with the prisoner proceeded on its journey and touched at Aden and Tuticorin. At the latter port he was made over to the police and produced before a Magistrate, who remanded him to custody. The Tuticorin Police then took the prisoner to Madras, from which place he was brought to Calcutta in police custody. He was placed before the Chief Presidency Magistrate, who, after holding a preliminary enquiry, committed him to the Criminal Sessions.

The prisoner was arraigned on the following indictment with two counts :—

(*i*) That he, the said Salimullah, on the 16th December, in the year of our Lord nineteen hundred and eleven, on board the British ship *Clan Lamont*, then and there being upon the high seas and within the Admiralty jurisdiction of this Court, did feloniously, wilfully and of malice aforethought, kill and murder one William McCrea, against the term of the Statute in such case made and provided, and against the peace of our Lord the King and Emperor, his Crown and dignity.

(*ii*) That he [*repeating the words of the first count*] did feloniously kill and slay the said William McCrea, etc.

Mr. Asghur, for the prisoner, raised a preliminary objection before the Jury were empanelled and the indictment read to the prisoner: This Court has no jurisdiction to try the case, as the offence was committed on the high seas and the vessel touched at Perim, where certain proceedings were held against the accused, and also at Aden and Tuticorin. He ought to have been tried by the first British Court that had Admiralty jurisdiction at the port where the ship touched. The offence and the charge should be laid under the Indian Codes, and not the English law: see Starling's Indian Criminal Law, 5th edition, pages 9 to 13; Ayyar's Criminal Procedure Code, page 19. The prisoner is a Native Indian. Since the enactment of 37 & 38 Vict., c. 27, s. 3, the Legislature intended that such persons should be tried under the Penal Code as the substantive law of India, though included in the term "British subject" as used in 57 & 58 Vict., c. 60, s. 686, and that the charge should be framed according to the Criminal Procedure Code: *Queen-Empress* v. *Sheik Abdool Rahiman* (1), *King-Emperor* v. *Chief Officer of the "Mushtari"* (2). The cases of *Queen-Empress* v. *Barton* (3) and *Queen-Empress* v. *Gunning* (4) were those of European British subjects; see also s. 4 of the Penal Code.

The Standing Counsel (*Mr. B. C. Mitter*), for the Crown. The offence and the indictment should be governed by the English law; see 57 & 58 Vict., c. 60, s. 686. The proviso to 37 & 38 Vict., c. 27, s. 3, applies only after conviction.

WOODROFFE J. Learned counsel for the accused, before the charge was read, contended, *first*, that

(1) (1889) I. L. R. 14 Bom. 227.
(2) (1901) I. L. R. 25 Bom. 636.
(3) (1889) I. L. R. 16 Calc. 238.
(4) (1894) I. L. R. 21 Calc. 782.

1912

EMPEROR v. SALIMULLAH.

WOODROFFE J.

this Court had no jurisdiction to try the case, and, *secondly*, that if it had, the Penal Code and not the English law was the substantive law applicable. The first contention is based on the fact that after the offence, the ship touched at the ports of Perim, Aden and Tuticorin. Assuming, for the sake of argument, though I do not consider the point, that the accused might have been tried at any of those places, section 684 of the Merchant Shipping Act (57 and 58 Vict., c. 60) provides for jurisdiction in any place in which the offender, or person complained against, may be. The accused is now here, however he may have come here (though it is to be noted that this port was that of the destination of the ship); and I hold, therefore, that this Court has jurisdiction to try him.

Learned counsel's argument on the second contention assumes that the question he now raises could not have arisen prior to the Court (Colonial) Jurisdiction Act (37 and 38 Vict., c. 27, s. 3), and that even after that Act the English law would be applicable if the accused had been by nationality British. The accused who is a British subject is, however, an Indian, native of Sylhet. Learned counsel, therefore, contends that, so far as such subjects are concerned, the law was altered by Courts (Colonial) Jurisdiction Act, and he relies upon the decisions of the Bombay High Court in *Queen-Empress* v. *Sheik Abdool Rahiman* (1) and *King-Emperor* v. *Chief Officer of the "Mushtari"* (2). His contention is that the substantive law varies with the nationality of the accused. The correctness of the Bombay decisions has been doubted by Mr. Mayne in his Criminal Law of India for reasons with which I agree (3rd edition, s. 76). As he states, and I agree, section 3 of the Courts (Colonial) Act does not deal with the trial of the case, but with

(1) (1889) I. L. R. 14 Bom. 227. (2) (1901) I. L. R. 25 Bom. 636.

the sentence after conviction, the statute adopting the local machinery for punishment to the English definition of crime. Moreover, the very terms of section 3 is against the contention now raised, in so far as it provides for the case of an offence which is not punishable by the law of the Colony in which the trial takes place. This negatives the view that the law governing the offence is the substantive law of the Colony. Section 686 of 57 and 58 Vict., c. 60, speaks of a "British subject," which includes an Indian subject. Reference has been made to section 4 of the Penal Code. It is possible to give this section a construction which is not inconsistent with the English Statute, but in any case it could not, assuming that the Indian Legislature had jurisdiction in this matter, affect the specific Statute of Parliament.

I hold, therefore, that the substantive law applicable to the case is the English law, and that the charge has been rightly framed in this respect. The accused will, therefore, be called upon to plead to the charge, and the trial will proceed.

[The trial proceeded, and the Jury ultimately found the prisoner not guilty on the first, but guilty on the second, count. Mr. Asghur contended that the sentence should be passed under the English law, as no section of the Penal Code corresponded to the offence of which the prisoner was found guilty. WOODROFFE J. reserved judgment; and considering that the offence found corresponded most nearly to the second part of section 304 of the Indian Penal Code, his Lordship sentenced him to four years' rigorous imprisonment thereunder.]

E. H. M.

PRIVY COUNCIL.

P.C.*
1911

Nov. 16, 17, 21;
1912

Jan. 25.

MI ME
v.
MI SHWE MA.

[ON APPEAL FROM THE COURT OF THE JUDICIAL COMMISSIONER, UPPER BURMA].

Burmese Law—Marriage—Mutual Consent—Repute as evidence of marriage—Polygamy—Marriage with sister of living wife—Wives living in separate houses—Social status of after-married wife, evidence as to—Effect of recognition of wife—Evidence of reputation.

No ceremony of any kind is essential to a marriage among Burmese. Mutual consent is all that is required ; and in the absence of direct proof consent may be inferred from the conduct of the parties or established by reputation.

In Burma polygamy is lawful, as also is marriage with the sister of a living wife, as well as with a deceased wife's sister.

The title of the respondent (plaintiff) to share in the property of a deceased Burman, a twinzayo or hereditary oil-well owner, depended on proof that she was his lawful wife, as to which the Courts in Burma differed, the Appellate Court finding on the evidence that she was. At the time of the alleged marriage, the plaintiff was a widow with children, and the deceased was the husband of the defendant, her elder sister, with whom after the marriage she remained on good terms, though for convenience, both having families, they lived in separate houses, at which the husband took his meals, to a far greater extent, however, at the house of the defendant than at that of the plaintiff.

Held, that there was abundant evidence that the plaintiff was recognised as the wife of the deceased. None of the witnesses said she occupied a dishonourable or inferior position, and it was difficult to see how there could be any question of social inferiority. The Courts regarded the evidence from different standpoints ; but whether the particular testimony on which they differed was accepted or not, there was very little contradiction in the evidence. On the whole the appellants had not

* PRESENT : LORD MACNAGHTEN, LORD ROBSON, SIR JOHN EDGE AND MR. AMEER ALI.

made out a sufficient case for disturbing the judgment of the Judicial Commissioner.

APPEAL from a judgment and decree (11th October 1909) of the Court of the Judicial Commissioner of Upper Burma which reversed a judgment and decree (9th February 1909) of the Court of the District Judge, Magwe.

The defendants were the appellants to His Majesty in Council.

The suit giving rise to this appeal was brought by the respondent for a share of the estate of one Maung Aung Myat, who died in 1902. The plaintiff claimed as his second wife and widow, making defendants to the suit her elder sister Mi Me, his first or chief wife and his children by her, and their children.

The defence was that the plaintiff was not a wife, but a concubine, and as such was not entitled to any share.

The only issues now material were (i) was Mi Shwe Ma a wife or a concubine of Maung Aung Myat and as such entitled to inherit? (ii) If so, to what share of the inheritance of Maung Aung Myat is she entitled?

The marriage of the plaintiff and Maung Aung Myat was alleged to have taken place in 1244 B.E. (1883 or 1884); there was admittedly no ceremony which is not essential to a valid marriage between Burmans; and the plaintiff accounted for the absence of it by the fact that both parties were "eindaungyi," or had both been married previously. Maung Aung Myat was a man of considerable means. He was a twinzayo, or hereditary oil-well owner, and as such was entitled to receive every year a certain number of oil-well sites in the oil-bearing district of Yenangyaung in Upper Burma.

1912

MI ME v. MI SHWE MA.

The evidence as summed up was to the following effect:—

At first Mi Shwe Ma lived at her mother's house and Maung Aung Myat used to visit her there, and sleep there at times. During the disturbances that followed the annexation of Burma in 1885, Maung Aung Myat and Mi Me and Mi Shwe Ma took to flight and lived together on an island for a month or two. After their return to Yenangyaung, Mi Shwe Ma lived with them at Mi Me's house for some time. It is uncertain how long this lasted. The witnesses speaking from memory vary from one or two months to two years. On the occasion of a fire which seems to have burnt down the village or part of it, Maung Aung Myat and Mi Me and Mi Shwe Ma all lived together for two and-a-half months in a hut on a sand bank. Then Maung Aung Myat built two new houses. At one Mi Me and her children by Maung Aung Myat lived: at the other Mi Shwe Ma and her two sons by her previous marriage lived. Maung Aung Myat habitually lived at Mi Me's house, and had his meals and did his business there, and it was generally regarded as his place of residence. But if people did not find him there, they went to Mi Shwe Ma's house where he received them. At times he stayed with Mi Shwe Ma., *e.g.*, when he happened to have quarrelled with Mi Me. Occasionally he had his meals there with Mi Shwe Ma. When Mi Shwe Ma's child by Maung Aung Myat was ill, Mi Me visited her and helped to nurse the child. Maung Aung Myat had his meals there for 6 or 7 days. Mi Me visited at Mi Shwe Ma's house on other occasions. Mi Shwe Ma similarly visited at Mi Me's house. When Maung Aung Myat had occasion to go to Rangoon on oil-well business he took Mi Me on the first visit and Mi Shwe Ma on the second. At least once Mi Shwe Ma went

1912

MI ME
v.
MI SHWE MA.

with Maung Aung Myat to help him in choosing a well site. On one occasion Maung Aung Myat visited Shwezettaw Pagoda with Mi Shwe Ma, leaving Mi Me at home. On another occasion he took both. On this trip he travelled in the same cart with Mi Me, while Mi Shwe Ma went in a separate cart. On at least two occasions Maung Aung Myat lent money jointly with Mi Shwe Ma. Maung Aung Myat used to keep fasts at a Zayat he had built, and both Mi Me and Mi Shwe Ma fasted with him on these occasions. Maung Aung Myat gave Mi Shwe Ma three oil wells which she enjoyed the produce of during his life-time. Mi Me's daughter and Mi Shwe Ma on one occasion borrowed money from a *chetti* for the purposes of Maung Aung Myat's oil-well business. Mi Me's son, Kyan Baw, with his wife lived for a time at Mi Shwe Ma's house. Invitations to offerings used to issue in the names of Maung Aung Myat and Mi Me, and not in Mi Shwe Ma's name. Maung Aung Myat used to visit the oil-wells sometimes with Mi Me, sometimes with Mi Shwe Ma. Maung Aung Myat paid *thatha-meda* (tax) in the name of himself and Mi Me, while Mi Shwe Ma paid separately for herself and her sons. Though she had had a quarrel with Maung Aung Myat and was not on speaking terms with him when he fell sick, Mi Shwe Ma visited and attended on him during his last illness and slept at Mi Me's house, where Maung Aung Myat was lying, at that time. The funeral was paid for with money of Maung Aung Myat's that Mi Me had. Mi Shwe Ma assisted at the funeral : not only did she buy things for the offerings as other relations and neighbours are said to have done, but she supervised the funeral arrangement with the assistance of elders. Mi Me was overwhelmed with grief, and her son, a witness Aung Gyi, consulted Mi Shwe Ma as to the offerings for the funeral.

1912

MI ME
v.
MI SHWE
MA.

The District Judge after discussing the evidence at some length concluded his judgment as follows :—

"The learned Advocate for the plaintiff contends that the plaintiff and Maung Aung Myat became husband and wife by mutual consent, one of the three modes of becoming husband and wife among the Burmese Buddhists according to Chan Toon's 'Principles of Buddhists Law'; and that living and eating together is not an essential element of marriage, but is merely formal proof of marriage : *Ma Gywe* v. *Ma Thi Da* (1). But according to this ruling the burden lies on the plaintiff to prove that her status was higher than that of a mistress or a mere concubine. The separate living and eating affords a presumption that she has not the status entitled to inherit a share in her husbands' estate, but the presumption can be rebutted by proof of the existence of a superior status. But the plaintiff has, to my mind, failed to prove that the late Maung Aung Myat lived and ate together with her, or that he lived indifferently with both the plaintiff and her sister Mi Me. The plaintiff has not shown that she had assisted him in acquiring his property, nor that she had ever been put in charge of his property and keys at any time.

The plaintiff has therefore, in my opinion, failed to prove satisfactorily that she had a status superior to that of a mistress or a concubine receiving the visits of the late Maung Aung Myat, who had given her three oil-wells, and two to her sons by her previous marriage, apparently to compensate her for the absence of her right to inherit his estate on his death. The plaintiff had enjoyed the profits from the said oil-wells separately before his death, and then after his death had them transferred to her name."

After referring to the remarks of Sir H. Adamson, Chief Judge of the Chief Court, Lower Burma, in the case of *Ma Wun Di* v. *Ma Kin* (2), which are referred to in the judgment of the Judicial Committee in that case, the judgment proceeded :—

"In this case the plaintiff knew perfectly well according to her own admission that Maung Aung Myat was the lawful husband of her own sister, Mi Me. She (plaintiff) admits that Maung Aung Myat and Mi Me were previously an unmarried couple (လင်လင်ငယ်မယား) at the time of their marriage. She knowingly took her sister's husband without her consent and committed a worse moral offence (လင် ခိုး stealing husband) condemned generally among the Burmans.

(1) 2 Upper Burma Rul. (1892-96), page 194.

(2) (1907) I. L. R. 35 Calc. 232, 236 ; L. R. 35 I. A. 41, 46.

For the said reasons I would answer the first issue that the plaintiff is only a mistress and not a lawful wife of the late Maung Aung Myat.

The wives who are accommodated in different houses are entitled to retain only the property of which she is in actual possession: see section 280 of the Kinwun Mingyi's Digest of Buddhist Law. Besides a wife who does not attend upon the husband during his illness, or one who does not perform the husband's funeral rites, is not entitled to inherit the property of the husband: see section 279 of the same Digest. But the plaintiff has failed to sufficiently prove that she had attended upon Maung Aung Myat during his illness, and also that she had performed his funeral rites as a wife, as stated already. She would not, therefore, be entitled to inherit the property of Maung Aung Myat even if she were held to be a lawful wife.

I answer the second issue accordingly that the plaintiff is not entitled to inherit the property of the late Maung Aung Myat at all."

On appeal by the plaintiff to the Court of the Judicial Commissioner (Mr. G. W. Shaw), that Court, after referring to the cases cited before him, said:—

"I think it follows from these decisions that the plaintiff in the present case had to prove, in order to get any share in the inheritance, that her status was superior to that of a lesser wife or concubine; and that, if she did so, she would be entitled to share on equal terms with the chief wife. A lesser wife or concubine, who lives with the husband, gets two-fifths, but when she lives separately she gets nothing.

After referring to the fact that Maung Aung Myat had two wives, "like many other Twinzayos"; that Mi Me was already married to him when he took to wife her younger sister Mi Shwe Ma, the plaintiff; and that there was no ceremony, "both parties being eindaungyi", stated that "from that time onwards she was publicly known as his wife as well as Mi Me", and after a review of the evidence in the case, said:—

"The District Judge after referring to the loose way in which the word wife *Maya* is used amongst the Burmese even in the Dhammathats, held that the point at issue must be determined by a consideration of the evidence as to the status, mode of living and eating, habits, and other circumstances of Maung Aung Myat and Mi Shwe Ma. That is the ordinary rule and it is sufficient for the proper decision of this case.

1912

MI ME
v.
MI SHWE MA.

In coming to the conclusion he did, the District Judge apparently relied on the following considerations :—(*i*) that Maung Aung Myat's ordinary or permanent residence, where he ate and slept and did his business, was Mi Me's house ; (*ii*) that the occasions of the disturbances and the fire were exceptional ; (*iii*) that Mi Pu and San Dun were not worthy of credit, and therefore it was not proved that Mi Shwe Ma lived in the same house with Mi Me and Maung Aung Myat after the disturbances ; (*iv*) that Mi Shwe Ma travelled to Shwezettaw in a separate cart and ate out of a separate pot, when Mi Me went ; (*v*) that the Zayat where the fast was kept was open to the public, and it was not proved that Mi Shwe Ma went with Maung Aung Myat ; (*vi*) that invitations to religious offerings, etc., were issued in in the names of Maung Aung Myat and Mi Me, and never in the name of Mi Shwe Ma ; (*vii*) that it was not proved that Mi Shwe Ma assisted Maung Aung Myat in the management of his oil-wells or other business, or in the acquisition of property ; (*viii*) that the gift of three oil-wells to Mi Shwe Ma showed that she was not a wife entitled to inherit ; (*ix*) that it was not proved that Mi Shwe Ma attended on Maung Aung Myat in his illness ; (*x*) that *thathameda* was paid by Mi Shwe Ma separately ; (*xi*) that on the authority of the late Chief Judge of the Chief Court, Lower Burma, in *Ma Wun Di* v. *Ma Kin* (1) when a Burmese woman cohabits with a man who, she knows, is already married, the presumption is that she is a mistress and not a wife ; and (*xii*) that Mi Shwe Ma in taking Maung Aung Myat "stole" Mi Me's "husband", and so committed a moral offence condemned generally among Burmans.

I have studied the evidence carefully and I find myself unable to concur in the District Judge's view of it. He does not seem to me to have regarded it fairly. To begin with, the facts that Mi Shwe Ma was Mi Me's own sister and that her connection with Maung Aung Myat lasted for 20 years, and was all through that time publicly known and looked upon as a marriage, were strongly in Mi Shwe Ma's favour.

The opinion of Sir H. Adamson in the case quoted coming from such an authority very naturally impressed their Lordships of the Privy Council. But all the same I venture to doubt its correctness. On the face of it, it is a remarkable utterance with respect to a state of things in which polygamy is admittedly legal. It is based apparently on the prejudice which undoubtedly exists among Burmans, at least in Lower Burma, against a married man taking another wife. But surely that prejudice is directed against the taking of the second woman and not against a (second) wife as opposed to a concubine or a mistress. Then again is it not a mistake to use the word "mistress" at all ? The Buddhist Law speaks of

(1) (1907) I. L. R. 35 Calc. 232, 236 ; L. R. 35 I. A. 41, 46.

wives and concubines. The feeling in favour of monogamy is so strong among English people that it is necessary to be on one's guard. The "mistress" of Western Europe is a different thing from the concubine of the Dhammathats. To convert a wife or even a lawful concubine into a mistress seems to be consistent neither with the Buddhist Law nor the cause of religion and virtue. However, in this case the burden of proof already lies on Mi Shwe Ma by reason of her separate living; so that the citation of *Ma Wun Di's Case* is not very material.

The episodes of the disturbances and the fire must be considered along with all the other circumstances of the case. My opinion of them is that as far as they go, they support the plaintiff's contention that she was a wife."

After discussing the evidence on the various points referred to above in order to show that the other conclusions of the lower Court were more or less erroneous, the Judicial Commissioner concludes as follows:—

"The only one of the points which the District Judge took against the plaintiff which has anything in it is the fact that *Maung Aung Myat gave her three wells*, and the question is whether that is sufficient to negative the inference suggested by all the circumstances in the case which tend to show that the plaintiff had the status of a wife entitled to inherit. On consideration, my opinion is that it is not sufficient. Maung Aung Myat similarly gave wells to Mi Me's children. It might have been a convenient method of arranging for Mi Shwe Ma's maintenance during his life time.

The District Judge's remark that Mi Shwe Ma "stole" Mi Me's "husband," etc., appears to me to beg the question. There is no prohibition in the Buddhist Law against a man marrying two sisters: and although there may be some popular prejudice against it, that is not sufficient to override the facts proved and admitted in the case, which show that Maung Aung Myat did marry Mi Shwe Ma. There is no evidence that he was considered by anybody to have committed a moral offence by doing so. The point is in fact irrelevant.

It is unnecessary to refer further to the lower Court's finding that if Mi Shwe Ma was a wife she was not entitled to inherit."

The decree of the Court below was therefore reversed and it was decreed that the plaintiff was satisfactorily proved to be a wife entitled to inherit on an equal footing with the first defendant.

1912

MI ME
v.
MI SHWE MA.

On this appeal,

De Gruyther K.C. and *E. U. Eddis*, for the appellants, contended that Mi Shwe Ma had not proved that she was the wife of Maung Aung Myat. It was clear on the evidence that, though Maung Aung Myat paid visits from time to time to her, his permanent residence was with Mi Me. That they all went away and lived together temporarily during the disturbrances which followed the annexation of Burma, and on the occasion when the village where they lived was burned down, was quite consistent with the first appellant's case. That there was no entertainment at the alleged marriage; that invitations were always issued in the joint names of Maung Aung Myat and Mi Me, and never in the name of the respondent; that the *thathameda* tax was paid by the respondent separately, but by the two others in their joint names; that the respondent took no share in the oil-well business; that there was no case proved in which the two women acted in any social way jointly as wives on an equal status; the incidents of their travelling when the respondent had a separate cart, and took her food separately; that Mi Me attended Maung Aung Myat in his last illness and performed the funeral ceremonies at his death, were all facts which showed that Mi Me was in a different and superior position from that to which the respondent was consistently relegated in their domestic life. The presumption was that she was, if a wife at all, one of a lower status than Mi Me. Reference was made to *Ma Wun Di* v. *Ma Kin* (1), a passage from the judgment of the Chief Judge of Lower Burma, which their Lordships of the Judicial Committee quoted with approval. In any case the respondent was not

(1) 1907) I. L. R. 35 Calc. 232, 236; L. R. 35 I. A. 41, 46.

entitled to share equally with the first appellant, and if the status was not equal, it was submitted, she had no right to inherit at all.

Sir R. Finlay K.C., *J. M. Parikh* and *C. G. S. Pillay*, for the respondent, contended that it was established on the evidence that she was the lawful wife of Maung Aung Myat. Polygamy was lawful among Burmans, and the chief or principal wife was the one first married: *Mi Kin Gale* v. *Mi Kin Gyi* (1); one afterwards married, if an inferior or lesser wife, was none the less a lawful one and shared on equal terms with the other. Reference was made to "Notes on Buddhist law" by Sir John Jardine, paragraphs 3, 15, 19, 23, 26 and 55; Chan Toon's "Principles of Buddhist Law" (Ed. 1903), Chapter on "Marriage, pages 23, 26, and *Ma Wun Di* v. *Ma Kin* (2). Admittedly no particular ceremony was essential, and no entertainment to relations and friends as both parties had been married before. The respondent was the sister of the first appellant, and was on good terms with her after the marriage; they visited one another, and the respondent lived with her mother after her marriage; those were all facts significant as showing that the respondent was a real wife and not merely a concubine. There was, it was submitted, a presumption of marriage as against concubinage. As to the status of the respondent, the evidence irresistibly raised an accumulative case of consent on the part of the first appellant; and she had acquiesced in the status of the respondent for 20 years. On the whole evidence, it was submitted that the respondent was entitled to inherit on an equal footing with the first appellant. As to the share she ought to get, her right in her husband's life-time and her right to succession on his

(1) (1910) Upper Burma Rul. 42. (2) (1907) I. L. R. 35 Calc. 232; L. R. 35 I. A. 41.

1912

MI ME
v.
MI SHWE MA.

death were not dependent on one another; and she might in the latter case have the right to half his estate without having had any right to it during his life-time. Reference was made to *Mi Ka* v. *Maung Thet* (1). If a wife, she was entitled to one-half of what her husband died possessed of: "Notes on Buddhist Law" by Sir J. Jardine, paragraphs 37, 43 49, 50.

De Gruyther K. C. replied referring to Chan Toon's "Principles of Budhist Law" as being the best book on the subject. All the property now in dispute was property acquired since the alleged marriage of Maung Aung Myat and the respondent, who, it was submitted, acquired all the interest she had in his property at her marriage to him and not at his death; and she therefore had no right to share in his property: *Mi Kine Gale* v. *Mi Kin Gyi* (2), and the extracts from the Dammathats at page 45 of the report of that case. It was the question of eating out of the same dish that was the test of a woman being the wife, and the respondent never ate out of the same dish as Maung Aung Myat. As was said in *Ma Wun Di* v. *Ma Kin* (3), there was little or no evidence of the respondent being a "wife" except the use of that term by the witnesses, and the same word was applied by all to relations not matrimonial.

The judgment of their Lordships was delivered by

Jan. 25. LORD MACNAGHTEN. This is an appeal from a judgment of the Judicial Commissioner of Upper Burma reversing a decree of the District Court of Magwe.

(1) (1873) Selected Judgment's from Upper Burma Rul. (1872—1892) p. 6.

(2) (1910) Selected Judgments from Upper Burma Rul. 42, 46, 47.

(3) (1907) I. L. R. 35 Calc. 232, 240, 241; L. R. 35 I. A. 41 46.

The question on which the Courts differed relates to the status of the plaintiff, Mi Shwe Ma. She claims to have been lawfully married to one Maung Aung Myat, deceased, and as his widow to be entitled to share equally in his estate with her elder sister Mi Me, who had been married to him for many years before his connection with the younger sister.

In Burma polygamy is undoubtedly lawful, and it is not unlawful to marry the sister of a living wife, though such a marriage is not considered quite respectable, while marriage with a deceased wife's sister is looked upon as proper and even laudable.

The law relating to marriage in Burma is extremely lax. No ceremony of any kind is essential. Mutual consent is all that is required. In the absence of direct proof consent may be inferred from the conduct of the parties or established by reputation. But when proof of marriage depends wholly or mainly on reputation the circumstances of the case must be scrutinised with some caution, because the same word which is used to describe a woman lawfully married is applied by the Burmese to a woman living with a man on less honourable terms. The lax notions prevalent among the lower classes on the subject seem to be generally deplored and condemned by their betters, and it may be that the difference of opinion between the two Courts is due in some measure to the fact that the District Judge was a native gentleman, an educated Burman, who naturally regarded with little favour, if not with positive repugnance, practices tolerated by the law of his country, but not in accordance with the standard of a higher civilisation. On the other hand, the Judicial Commissioner was an Englishman of great experience, without any prejudice in favour of Western notions, whose only object seems to have been to administer the law truly

1912

MI ME
v.
MI SHWE MA.

and indifferently as he found it laid down in the Dhammathats and the rulings of his predecessors, and in Sir John Jardine's "Notes on Buddhist Law," which seems to be the principal authority on the subject.

Both the learned Judges analyse the evidence with great care, though they regard it from different standpoints. The District Judge puts aside the testimony of some witnesses as unworthy of belief, while the Judicial Commissioner thinks there was no reason for discrediting them. Whether that particular testimony is accepted or not there is very little contradiction in the evidence. There is abundance of evidence to the effect that Mi Shwe Ma was recognised as the wife of Maung Aung Myat. Mi Me herself says, "Plaintiff was known notoriously as Maung Aung Myat's wife." No one says that she occupied a dishonourable or an inferior position. Maung Aung Myat was a Twinzayo, that is an hereditary oil-well owner, and as such entitled to receive every year a certain number of oil-well sites in the oil-bearing district of Yenangyaung in Upper Burma. Twinzayo after Twinzayo comes forward on both sides to say that Twinzayos generally have two wives, and that Mi Shwe Ma was Maung Aung Myat's wife. Some of the witnesses may have used the word translated "wife" in a loose sense, but at least one witness on each side says that Maung Aung Myat and Mi Shwe Ma were "husband and wife"— an expression which seems to convey the meaning that she was his wedded wife. Then it may be observed that one of the witnesses, who says that Mi Shwe Ma was Maung Aung Myat's wife, was not a Burman, but a Mahomedan of some position, being the head clerk in the Burma Oil Company.

The points on which most reliance was placed on behalf of the appellant seem capable of explanation.

One point was that there was no entertainment given on Mi Shwe Ma's alleged marriage. When there is a marriage between persons who have not been married before, it seems to be usual to give an entertainment at which "pickled tea" is the principal feature, or at least the chief delicacy. There was no pickled tea at Mi Shwe Ma's wedding. But then it seems that, in the case of persons who have been married before, it is not usual to have these entertainments. Maung Aung Myat had five or six children grown up living with him, and Mi Shwe Ma was a widow with two children living. Then something was made of the fact that Mi Shwe Ma continued to live with her mother in her own house. But there is authority for saying that such an arrangement is a mere matter of convenience, and probably necessary for the sake of peace and quietness, when each wife has a family of her own. Great stress was laid on the fact that it was not clearly proved that Maung Aung Myat and Mi Shwe Ma messed together, or used to "eat out of the same pot." "Eating out of the same pot" seems rather to be an outward and visible sign of social equality than a proof of matrimony. A man united to a woman of lower degree raises her to his own social position by "eating out of the same pot." Here there is evidence that Maung Aung Myat took his meals with Mi Shwe Ma and her family when he visited her. It is difficult to see how there can be any question of social inferiority in the present case. Mi Me was Mi Shwe Ma's sister, and on perfectly good terms with her and the mother during Maung Aung Myat's life. As to Maung Aung Myat's business, he seems to have managed it himself. Sometimes one sister and sometimes the other, sometimes both, were seen with him when he visited his oil-wells, but apparently he kept the business in his own hands.

1912

MI ME v. MI SHWE MA.

On the whole their Lordships are of opinion that the appellants have not made out a sufficient case for disturbing the judgment of the Judicial Commissioner, and their Lordships will therefore humbly advise His Majesty that the appeal should be dismissed with costs.

Appeal dismissed.

Solicitors for the appellants: *Sanderson, Adkin, Lee & Eddis.*

Solicitors for the respondent: *T. L. Wilson & Co.*

J. V. W.

CIVIL RULE.

Before Justice Sir Cecil Brett and Mr. Justice Carnduff.

1912

Feb. 5.

NEPAL CHANDRA ROY CHOWDHURY

v.

NIRODA SUNDARI GHOSE.*

Ex parte decree—Application for setting aside ex parte decree—Limitation—Limitation Act (XV of 1877), Sch. II, Art. 164—Limitation Act (IX of 1908), Sch. I, Art. 164—General Clauses Act (X of 1897), s. 6.

Where the right of the judgment-debtor to make an application for setting aside an *ex parte* decree was lost under the provisions of Article 164, Schedule II of the Limitation Act of 1877, long before Act IX of 1908 was passed, the provisions of the new Limitation Act of 1908 cannot revive the right to apply for setting aside the decree.

CIVIL RULE obtained by the plaintiffs, Nepal Chandra Roy Chowdhury and another.

The petitioners brought a suit for recovery of the amount due on an instalment-bond executed by Behari Lal Ghosh, the husband of the defendant, who is the opposite party in this Rule, for rent and *salami* of the

* Civil Rule, No. 5565 of 1911, against the order of Chandra Bhusan Banerjee, Additional Subordinate Judge of Khulna, dated September 1911.

land in which the defendant resided with her husband and children. The suit was decreed *ex parte* on the 28th March 1906. The plaintiffs alleged due service of summons of the case on the defendant. The defendant denied it. On the 19th February, 1907, the plaintiffs applied for execution of the said decree, and in execution thereof duly attached the price of land and the huts standing thereon and belonging to the defendant. The property was sold on the 27th May, 1907, and purchased by the plaintiffs, who were the decree-holders. The plaintiffs duly took delivery of possession of the land through the Court, and in 1910 erected a house on the land. On the 27th June, 1911, the defendant filed an application under Order IX, rule 13 of the Code of Civil Procedure for setting aside the *ex parte* decree of the 28th March, 1906, on the ground of non-service of summons on her. The decree was set side on the 7th September, 1911, the Subordinate Judge finding that there was no service of summons and holding that the provisions of the new Limitation Act of 1908 were applicable. On the 17th September, 1911, the plaintiffs applied under section 114 and Order XLVII, rule 1 of the Code of Civil Procedure, for a reconsideration of the order of the 7th September 1911, on the ground that the application under Order IX, rule 13, was time-barred under Article 164 of the Second Schedule of the Limitation Act of 1877. This application was rejected on the 19th September 1911. The plaintiffs thereupon applied to the High Court under section 15 of the Provincial Small Cause Court and section 115 of the Code of Civil Procedure for setting aside the orders of the 7th and 19th September 1911.

Babu Charu Chandra Biswas, for the petitioners. The lower Court was clearly wrong in applying Act

1912

NEPAL CHANDRA ROY CHOWDHURY v. NIRODA SUNDARI GHOSE.

IX of 1908. The right to set aside the *ex parte* decree accrued while the Limitation Act of 1877 was in force, as soon as any process was taken to enforce the decree. The right became barred on the expiry of thirty days from the date of accrual, under Article 164 of the old Limitation Act. That was long before the Act of 1908 came into force. It was not as if no steps had been taken in execution, and the right to set aside consequently continued unaffected by the bar of limitation when the new Limitation Act came into operation, so that it might be said with some plausibility that the application would be governed by the provisions of the new Act. Here the right had been clearly barred under the Limitation Act in force at the time. And a right barred under Act XV of 1877 could not be revived by Act IX of 1908, simply because the application was made after the latter Act came into force See also section 2 of Act XV of 1877 and *Mohesh Narain Munshi* v. *Taruck Nath Moitra* (1). The absence of any express saving clause like that in the present Act has not in any way changed the law, in view of the clear provisions of the General Clauses Act X of 1897, section 6(*a*) and (*c*) and section 8. The terms of section 6(*a*) are wide enough to cover a case like this.

No one appeared to show case for the opposite party.

BRETT AND CARNDUFF JJ. This Rule was issued to show cause why an order passed by the Subordinate Judge setting aside an *ex parte* decree should not be reversed on the ground that the application on which it was made was barred by limitation. The present applicant brought a suit to recover the amount due on an instalment bond, and obtained an *ex parte* decree

(1) (1892) I. L. R. 20. Calc. 487 ; L. R. 20. I. A. 30.

on the 28th March 1906. Execution was applied for on the 19th February 1907, and the property of the judgment-debtor was sold and purchased by the decree-holder on the 27th May 1907. The present application by the opposite party to set aside the *ex parte* decree was made on the 27th June 1911, that is to say, more than four years after the conclusion of the previous proceedings. Before the lower Court it was contended on behalf of the present applicant that the application was barred on the ground that the application to set aside the *ex parte* decree obtained by the applicant could only have been made when the provisions of the Limitation Act of 1877 were in force, and that, as under Article 164 of the Second Schedule of that Act, the application ought to have been made within thirty days from the date of executing the process for enforcing the judgment, the application was barred by limitation long before it was made on the 27th June 1911, and the right of the opposite party to make the application was lost long before the passing of Act IX of 1908, the present Limitation Act. The learned Subordinate Judge was, however, of opinion that the limitation provided in Article 164 of the First Schedule of Act IX of 1908 was applicable, and that the application was in time, as it was within thirty days of the time when the applicant had knowledge of the decree. The Rule was issued to set aside the order of the Subordinate Judge, and no one has appeared to contest it. In our opinion, the view taken by the learned Subordinate Judge cannot be accepted. The right of the opposite party to make the application was lost under the provisions of Article 164, Schedule II of the Limitation Act of 1877, long before Act IX of 1908 was passed, and section 6 of the General Clauses Act distinctly provides that

1912

NEPAL CHANDRA ROY CHOWDHURY v. NIRODA SUNDARI GHOSE.

the repeal of the old Act would not have the effect of reviving any right not in force or existing at the time the repeal was made. We think, therefore, that on this ground the Rule must be made absolute, and the order of the Subordinate Judge set aside. The applicant is entitled to his costs of this hearing.

S. M. *Rule absolute.*

APPELLATE CIVIL.

Before Sir Lawrence H. Jenkins, K.C.I.E., Chief Justice, and Mr. Justice N. R. Chatterjea.

1912

Feb. 6.

EASTERN MORTGAGE AND AGENCY CO., LD.,

v.

PURNA CHANDRA SARBAGNA.*

Privy Council—Application for leave to appeal—Limitation—Admissibility of appeal filed after six months of the judgment—Time for taking copy of judgment and decree—Limitation Act (IX of 1908) s. 12 ; Sch. I, Art. 179.

Clause (2) of section 12 of the Limitation Act, 1908, applies to an application for a certificate under Order XLV of the Code of Civil Procedure.

APPLICATION for leave to appeal to the Privy Council.

The judgment appealed against in this matter was passed by the High Court on the 3rd June 1910. The appellants to His Majesty in Council applied, on the 12th June 1910, for copies of the judgment and decree. Copies were ready on the 30th August, and the petitioners actually got them on the 31st August 1910. The petition for leave was filed on the 5th December 1910, the six months from the judgment appealed against expiring on the 3rd December.

* Application for leave to appeal to His Majesty in Council, No. 102 of 1910.

Babu Jogesh Chandra Roy (with him *Babu Shibchandra Palit* and *Babu Prakash Chandra Mazumdar*), for the respondent, took a preliminary objection to the admissibility of the appeal. The application for leave to appeal to the Privy Council was filed more than six months after the date of the decree in appeal. Of course the provisions of the new Limitation Act of 1908 may be said to be against my contention, and I admit that the construction put by your Lordships on section 12 of the Limitation Act of 1908 will decide the point. I contend that clause (*2*) of section 12 cannot apply to such an application.

Dr. Rashbehary Ghose (with him *Babu Gunada Charan Sen*), for the appellant. The alterations made in section 12 of the Limitation Act of 1908, read with Article 179 of the same Act, make it clear that time taken for getting copy of the decree is now to be excluded.

Babu Jogesh Chandra Roy, in reply.

JENKINS C.J. AND CHATTERJEA J. This is an application by way of a petition to the Court under Order XLV, rule 2 of the Code of Civil Procedure, 1908, by one desiring to appeal to His Majesty in Council.

A preliminary objection has been raised that the application is out of time, and in support of this it is argued that clause (*2*) of section 12 of the new Limitation Act does not apply to an application for a certificate under Order XLV of the Code. But the answer to this is furnished by the phraseology of Article 179 of the first Schedule of the Limitation Act, which describes an application of this kind as an application for leave to appeal to His Majesty in Council. It is manifest, therefore, that clause (*2*) of section 12 of the Limitation Act does apply to applications such as the present, and the objection fails.

1912

EASTERN MORTGAGE AND AGENCY CO., LD., v. PURNA CHANDRA SARBAGNA.

As the decree from which it is sought to appeal is one of reversal, the only question is whether the amount or value of the subject-matter in dispute is of the requisite amount, or whether it involves directly or indirectly some claim or question to property of the value of Rs. 10,000.

The facts are these: The appeal now before us relates to rent, and it is said that the tenants have been evicted from a part of the land included in the tenancy, and the result has been that the High Court has decided that the rent is suspended and no claim therefore lies as long as the eviction continues.

The amount of the rent is Rs. 1,300 and odd, and it is claimed on the part of the applicant that if this sum of Rs. 1,300 is capitalized, it will reach a sum of more than Rs. 10,000. Further, it has been said on the part of the applicant that the eviction has been brought about by the creation of leases in favour of the tenants in perpetuity which cannot be brought out, and therefore the dispossession must continue for ever. It is accordingly claimed that the amount of the capitalized value of Rs. 1,300 would be more than Rs. 10,000; but the other side says that the capitalized value falls far short of that amount.

We have not before us the materials necessary for the decision of this question, and we must therefore utilize the provisions of rule 5, Order XLV of the Code, and refer the dispute to the Court of first instance to determine the amount or value and return its report to this Court.

S. M.

APPELLATE CIVIL.

Before Mr. Justice Chitty, Mr. Justice Coxe and Mr. Justice D. Chatterjee.

1912

Feb. 12.

RADHA KANTA CHAKRAVARTI

v.

RAMANANDA SHAHA.*

Estoppel—Non-transferable occupancy holding—Mortgage of the holding—Purchaser of the holding at private sale—Subsequent lease by landlord to purchaser—Evidence Act (I of 1872), s. 115.

A person, having a raiyati interest in certain lands, mortgaged the same to the plaintiff without the landlord's consent Subsequently, various transfers of portions of the lands mortgaged were effected to different persons by the widow of the mortgagor. Finally, the widow sold a portion of the mortgaged lands with the consent of the landlord to one Radha Kanta Chakravarti, who after his purchase took a fresh lease of the same from the landlord at an enhanced rent on payment of a premium. A suit having been instituted by the mortgagee for recovery of the mortgage money, the widow and all the subsequent transferees, including the purchaser, were made parties. The purchaser pleaded that he was not a necessary party to the suit, and that the mortgage was invalid on the ground that the raiyati right was not transferable. The District Judge having decided against him on these points, the purchaser appealed to the High Court :

Held (COXE J. dissenting), that the purchaser claiming under a title partly at least created by the mortgagor, was estopped from raising the plea of non-transferability of the holding.

Krishna Lal Saha v. *Bhairab Chandra Rahat* (1), *Asmatunnessa Khatun Saheba* v. *Harendra Lal Biswas* (2), *Doe* v. *Stone* (3), *Doe* v. *Vickers* (4),

*Appeal from Appellate Decree, No. 2457 of 1908, against the decree of A. H. Cuming, District Judge of Tipperah, dated July 28, 1908, reversing the decree of Lalit Mohan Bose, Munsif of Tipperah, dated June 17, 1907.

(1) (1905) 9 C. W. N. CCXLVIII.
(2) (1908) I. L. R. 35 Calc. 904 ; 12 C. W. N. 721.
(3) (1846) 3 C. B. 176.
(4) (183) 4 Ad. & E. 782.

1912.

RADHA KANTA CHAKRAVARTI v. RAMANANDA SHAHA.

Hughes v. *Howard* (1), *Debendra Nath Sen* v. *Mirza Abdul Samed Seraji* (2) referred to.

ON the 13th October 1900, one Mani Ram Kaibarta mortgaged without the landlord's consent certain lands, in which he had raiyati rights, to Ramananda Shaha to secure Rs. 400 and interest at the rate of Re. 1-14 per cent. per mensem. Mani Ram died, leaving him surviving his widow as his sole heir. Subsequently, various transfers of portions of the lands mortgaged were effected to different persons. Thereafter, on the 11th January 1907, the widow with the consent of the landlord sold a part of the mortgaged lands to one Radha Kanta Chakravarti. The mortgage money not having been paid off, Ramananda Shaha, on the 12th January 1907, instituted a suit for recovery of the same against the widow and the transferees, other than Radha Kanta, who, on the 27th January 1907, took a fresh lease from the landlord of the lands he had purchased from the widow at an enhanced rent on payment of a premium. On the defendants' objection Radha Kanta was, on the 5th February 1907, made a party defendant No. 6 in the suit. The Court of first instance dismissed the suit as against defendants Nos. 3 and 6, and decreed it as against the other defendants. On appeal, the judgment of the lower Court was reversed, and the suit was decreed against defendant No. 6 also, while the appellant withdrew his appeal against defendant No. 3. Thereupon the defendant No. 6 appealed to the High Court on the ground that he was not a proper and necessary party to the suit, and that he was not estopped under section 115 of the Evidence Act from pleading that the plaintiff's mortgage was void, and inoperative as against him on the ground of non-transferability.

(1) (1858) 25 Beav. 575. (2) (1909) 10 C. L. J. 150.

The appeal came on for hearing before Chitty and Coxe JJ., and their Lordships having differed in opinion, passed the following judgments :—

CHITTY J. This is an appeal by Radha Kanta Chakravarti, defendant No. 6, in a mortgage suit against the decree of the District Judge of Tipperah, making him liable under the mortgage. One Maniram, or Manu, Kaibarta, husband of defendant No. 1, by a mortgage bond dated 27th *Assin* 1307 (13th October 1900), mortgaged 8 kanis 13 gundas 3 karas of land, in which he held raiyati rights, to the plaintiff to secure Rs 400 and interest at Re. 1-14 per mensem. Maniram died without having paid off the mortgage or any part of it. His widow, defendant No. 1, transferred some portion of the land to defendant No. 2, who again sold to defendant No. 3. Defendants Nos. 3 and 4 are puisne mortgagees of those portions. By a *kobala* dated and registered on 27th *Pous* 1313 (11th January 1907) defendant No. 1, with the consent of the landlord, sold plots 1, 2, 3, 5, 6 and 7 of the lands in suit, measuring between 4 and 5 kanis, to defendant No. 6. This suit was filed by plaintiff on 12th January 1907. Defendant No. 6 was not at first made a party. After the institution of the suit, namely, on the 13th *Magh* 1313 (27th January 1907), the defendant No. 6 took a fresh settlement from the landlord of the land which he had purchased from defendant No. 1, and a patta and kabuliyat at an enhanced rent were exchanged. Defendant No. 6 was added as a party defendant on 5th February 1907, and, with defendant No. 3, alone contested the suit.

The only points for our determination are (i) whether defendant No. 6 was a proper and necessary party to the suit, and (ii) whether he is estopped from pleading the invalidity of the mortgage on the ground that the raiyati right of Maniram was not transferable. The District Judge decided against him on both points, and defendant No. 6 has appealed. As to the first point, the appellant's Pleader relied on the case of *Jaggeswar Dutt* v. *Bhuban Mohan Mitra* (1), but in my opinion this is a very different case. There, it was held, that a third party, who is in no way connected with the mortgage and who claims adversely to both mortgagor and mortgagee, cannot be made a party to a suit on the mortgage in order to try the question of his title. Here defendant No. 6 admittedly acquired a title to the land in question in the first instance from the mortgagor, but claims to have exchanged it for something better by subsequently taking a fresh settlement from the landlord. The question whether he can be allowed to do this is a question properly arising for determination in the mortgage suit, and he was, therefore, rightly made a party defendant.

(1) (1906) I. L. R. 33 Calc 425.

1912

RADHA KANTA CHAKRAVARTI v. RAMANANDA SHAHA.

CHITTY J.

The next question is whether he is estopped as a representative of the mortgagor from denying the validity of the mortgage, in other words, can he now be allowed as against the mortgagee to relinquish the title which he derived from the mortgagor, and set up the title subsequently acquired from the landlord? The learned pleader for the appellant cited the case of *Agarjan Bibi* v. *Panaulla* (1), but, in my opinion, that case has really no bearing on the present question. The question seems to me one to be decided on general principles of equity. Defendant No. 6 having previously obtained the landlord's consent, purchased a portion of this holding from defendant No. 1. He clearly derived his title to what he purchased from defendant No. 1 alone and not, as has been argued, from defendant No. 1 and the landlord together. The whole title to what defendant No. 6 purchased was in defendant No. 1, and the fact that the landlord's consent was necessary before she could part with it does not mean that the title was derived in part from the landlord.

Defendant No. 6, therefore, took what he purchased subject to the liabilities which defendant No. 1 or her husband had incurred, that is to say, he took subject to the mortgage. If the suit had then been brought against him, he could not have denied the validity of the mortgage. Can he subsequently throw off that title and acquire a new one for the obvious purpose of defeating the mortgagee's claim? I am of opinion that it would be inequitable to allow him to do so, and it would certainly open the door to fraud in a large number of cases.

The case of *Krishna Lal Saha* v. *Bhairab Chandra Rahat and another* (Second Appeal No. 35 of 1904) (2) was brought to our notice. The facts of that case appear to be very different from the present. There the contesting defendant had purchased the right, title and interest of the mortgagor at an execution sale. If the occupancy holding was not transferable by custom, he took no interest in it by his purchase. That appears to me very different from the present case of a voluntary transfer by the mortgagor made with the landlord's consent previously obtained. Here defendant No. 6 obtained a perfectly good title by his purchase from the mortgagor with the landlord's consent subject only to the mortgage. There could be no possible object in his obtaining a fresh settlement from the landlord at an enhanced rent, except to defeat or endeavour to defeat the claims of the mortgagee. This he ought not to be allowed to do. I would dismiss the appeal with costs.

As my learned colleague is of a different opinion, the case must be laid before the Chief Justice for reference to a third Judge.

(1) (1910) I. L. R. 37 Calc. 687; (2) (1905) 9 C. W. N. CCXLVIII. 14 C. W. N. 779.

COXE J. I think that this appeal ought to be allowed. The land to which it relates was purchased by the appellant on the 11th January 1907 with the landlord's consent, and on the 27th January 1907 the appellant obtained a settlement from the landlord at an enhanced rent on payment of a premium. The land formed part of a holding which had been mortgaged to the plaintiff without the landlord's consent by the husband of the vendor of the appellant. The plaintiff sued upon the mortgage on the 12th January 1907, not making the appellant a party. But as the other defendants objected, the plaintiff made the appellant a party on the 6th February 1907. It is found that the holding was not transferable without the landlord's consent, and that the sale to the appellant was effected *bonâ fide* for consideration.

The question for decision is whether under these circumstances the appellant is estopped from pleading that the holding was not transferable without the landlord's consent. That it was not so transferable is laid down in numerous rulings, of which the last is *Agarjan Bibi* v. *Panaulla* (1). The mortgagee took nothing by his mortgage, and all that has to be decided is whether the appellant is entitled to say so. Now, if he had purchased the holding in execution of a money decree, at which no title whatever would have passed, and the judgment-debtor's interest would, in the eye of the law, have continued to subsist [*Bhiramali Sheikh Shikdar* v. *Gopikant Shaha* (2)] and had subsequently taken a settlement, he would have been entitled to raise the plea that the holding was not transferable by the judgment-debtor without the landlord's consent: *Krishna Lal Saha* v. *Bhairab Chandra Rahat* and another (Second Appeal No. 35 of 1904) (3). It seems anomalous that a person acquiring title in such a manner should practically get the property free of encumbrances, while one who regularly purchases according to the law with the landlord's consent should be bound by all that the original tenant debtor has unlawfully done.

Doubtless there is authority that a tenant who mortgages his property without the landlord's consent is estopped from afterwards pleading that it is not transferable. The learned Judges who decided the case of *Agarjan Bibi* v. *Panaulla* (1), guarded themselves from expressing an opinion on this point, and it has been strenuously argued in this case that there can be no estoppel against the law of the land. If it be assumed that the transferee knows the custom of the country that holdings are not transferable without consent, then, it is said, he cannot be misled by the

(1) (1910) I. L. R. 37 Calc. 687 ; 14 C. W. N. 779.

(2) (1897) I. L. R. 24 Calc. 355 ; 1 C. W. N. 396.

(3) (1905) 9 C. W. N. CCXLVIII.

1912

RADHA KANTA CHAKRAVARTI v. RAMANANDA SHAHA.

COXE J.

statement of the tenant that his holding is so transferable. But undoubtedly there is plenty of authority for the opposite view, and I am not prepared now to question that authority.

But I do not think that the principle of estoppel should be extended to purchasers with the landlord's consent. If a man wants land which he knows to be not transferable without the landlord's consent and buys it with the landlord's consent, I do not see why he should be bound by previous transfers without consent, which he had every reason at the time of his purchase for believing or indeed knowing to be invalid. He is not, I think, a mere representative of the tenant within the meaning of section 115 of the Evidence Act, but something more than that. Two persons, the landlord and the tenant, had to join in giving him his title, and he does not derive his title exclusively from either but from both. So far as he derives it from the landlord, he is not, in my opinion, the representative of the tenant, and is entitled to question the tenant's alienations.

Taking this view, I would allow the appeal and restore the Munsif's decision.

The case was thereupon referred to D. Chatterjee J. under s. 98 of the Code of Civil Procedure of 1908.

Babu Harendra Narain Mitra and *Babu Sasadhar Roy*, for the appellant.

Dr. Rashbehary Ghose, *Babu Dhirendra Lal Kastgir* and *Babu Gopal Chandra Das*, for the respondent.

Cur. adv. vult.

D. CHATTERJEE J. An occupancy holding, which has been found to be not transferable without the consent of the landlord, was mortgaged to the plaintiff. Defendant No. 1, who is the heir of the mortgagor, sold a part of this holding to defendant No. 6 with the consent of the landlord, who subsequently gave a fresh lease to defendant No. 6 at an enhanced rent. On a suit being brought on the mortgage, the defendant No. 6 pleaded that the mortgage was void, as the holding mortgaged was not transferable without the consent of the landlord, and no such consent had been

obtained. There being a difference of opinion as to whether defendant No. 6 was estopped from pleading the non-transferability of the holding, the question has been referred to me under section 98 of the Civil Procedure Code. I shall in this judgment call defendant No. 1 the mortgagor, and the defendant No. 6 the appellant.

It is contended by the learned vakil for the appellant that there can be no estoppel against a statute, and, as an occupancy holding is not transferable under the Bengal Tenancy Act, there can be no estoppel from pleading what the statute provides. The statute, however, does not provide either that these holdings are transferable or not transferable, but leaves the question to be decided by local usage or custom: *see* sections 178 and 183. The existence or otherwise of the custom or usage is a fact to be pleaded and proved, and I do not think that the principle relied on has any application to the present case. It is next contended that the purchaser is not a representative of the mortgagor within the meaning of section 115 of the Evidence Act, as he has derived his title practically from the landlord alone, without whose consent the sale would have passed nothing. The landlord alone could not, however, have given him a title. Any grant by the landlord alone during the subsistence of the tenancy of the mortgagor could not entitle him to the possession of the holding. There is some controversy in the books as to whether a sale of a portion of an occupancy holding confers any title on the purchaser, and the matter is under consideration by the Full Bench. I would, however, take it for granted that the mortgagor alone could not confer any title, and neither could the landlord by his own act and without the concurrence of the mortgagor. The two,

1912

RADHA KANTA CHAKRAVARTI v. RAMANANDA SHAHA.

CHATTERJEE J.

therefore, joined to pass such title as the appellant has acquired. In this view the appellant has derived some title from the mortgagor, although he has acquired an additional title from the landlord, and to that extent at least he must be considered a representative of the mortgagor. The mortgagor was bound by his deed of mortgage not to assert against the mortgagee that he had no right to mortgage, and the appellant, who derived his title, at least in part, from the mortgagor, cannot be allowed to make a like assertion.

Against this view of the law the learned vakil for the appellant has relied on two cases—(*i*) an unreported decision of Ghose and Pratt JJ., in appeal from Appellate Decree No. 35 of 1904, *Krishna Lal Saha* v. *Bhairab Chandra Rahat* (1), and (*ii*) a decision of Rampini, Offg. C.J., and Ryves J., in *Asmatunnessa Khatun Saheba* v. *Harendra Lal Biswas* (2). In the first case an auction-purchaser of the interest of the mortgagor in an occupancy holding, who after his purchase obtained recognition from the landlord, was held to be not estopped from pleading the non-transferability of the holding to a suit by the mortgagee on his mortgage bond; the learned Judges said that the defendant No. 2 (the auction-purchaser of the holding) stood on a higher ground independent of the purchase, and could not, therefore, be estopped from raising the plea of non-transferability. In the second case the landlord himself purchased a mortgaged holding in execution of a money decree, and then took the plea in a suit by the mortgagee on his mortgage, and was held entitled to do so.

I do not think it would be right to distinguish these cases as cases of purchase by auction sale; for

(1) (1905) 9 C.W.N. CCXLVIII.

(2) (1908) I. L. R. 35 Calc. 904; 12 C.W.N. 721.

although there were some cases in the books [see *Lala Parbhu Lall* v. *Mylne* (1), *Gour Sundar Lahiri* v. *Hem Chunder Chowdhury* (2), *Bashi Chunder Sen* v. *Enayet Ali* (3)], which held on the authority of certain dicta of the Judicial Committee [see *Anundo Moyee Dossee* v. *Dhonendro Chunder Mookerjee* (4), *Dinendronath Sannyal* v. *Ramcoomar Ghose* (5)], that estoppels binding upon the judgment-debtor were not binding upon the auction-purchaser, the matter has been finally set at rest by the Judicial Committee itself in the case of *Mahomed Mozuffer Hossein* v. *Kishori Mohun Roy* (6), in which their Lordships held that the auction-purchaser was bound by an estoppel which bound the person whose right, title and interest he purchased. There is, however, a material distinction, and that is that in neither of those cases the mortgagor co-operated with the purchaser for creating a title in derogation of the mortgage. This upon general principles of equity the mortgagor should not be allowed to do, and there is ample authority for this. I may refer in this connection to the case of *Doe* v. *Stone* (7), in which it was held that it was not open to a person who has derived title from a mortgagor, to set up against the claim of the mortgagee a title which the mortgagor himself could not set up. In the case of *Doe* v. *Vickers* (8), a mortgagor of a leasehold property suffered an ejectment and took a fresh lease; he was not allowed to set up this new lease against the claim of the mortgagee. In the case of *Hughes* v. *Howard* (9),

(1) (1887) I. L. R. 14 Calc. 401.
(2) (1889) I. L. R. 16 Calc. 355, 360.
(3) (1892) I. L. R. 20 Calc. 236.
(4) (1871) 14 Moo. I. A. 101, 111.
(5) (1881) L. R. 8 I. A. 65; I. L. R. 7 Calc. 107.
(6) (1895) I. L. R. 22 Calc. 909; L. R. 22 I. A. 129.
(7) (1846) 3 C. B. 176.
(8) (1836) 4 Ad. & E. 782.
(9) (1858) 25 Beav. 575.

1912.

RADHA KANTA CHAKRAVARTI v. RAMANANDA SHAHA.

CHATTERJEE J.

the mortgagor in collusion with the lessor and the second mortgagee incurred a forfeiture of the mortgaged leasehold and took a fresh lease from the landlord, but was not allowed to set up this lease in answer to the suit of the mortgagee. The case of *Debendra Nath Sen* v. *Mirza Abdul Samed Seraji* (1) may also be referred to as supporting this conclusion.

In the result, therefore, I agree with Mr. Justice Chitty and hold that the appellant, the defendant No. 6, is estopped from raising the plea of non-transferability.

O. M. *Appeal dismissed.*

(1) (1909) 10 C. L. J. 150.

APPELLATE CRIMINAL.

Before Mr. Justice Caspersz and Mr. Justice Sharfuddin.

1911

May 10.

SURENDRA NARAYAN ADHICARY

v.

EMPEROR.*

Sedition—Publication, proof of—Necessity of proving, posting, or printing and publishing under the directions of the accused, when it is shown that the handwriting is his, and that the seditious matter was actually printed and published—Seditious manuscript transmitted by post but intercepted before it reached addressee—Attempt to commit sedition—Penal Code (Act XLV of 1860) s. 124A.

It is not necessary, in order to establish the fact of publication of seditious matter transmitted through the post office, on a charge under s. 124A of the Penal Code, to prove the actual posting, nor that it was printed and published under the directions of the accused. If the seditious writing is shown to be in the handwriting of the accused, and it is further proved that the contents were in fact printed and published, there is sufficient evidence of publication by him.

Regina v. *Lovett* (1) followed.

* Criminal Appeal No. 277 of 1911, against the order and sentence passed by Umesh Chandra Sen, Deputy Magistrate of Malda, dated Dec. 5, 1910.

(1) (1839) 9 C. & P. 462.

1911

SURENDRA NARAYAN ADHICARY v. EMPEROR.

The sending through the post of a packet containing a manuscript copy of a seditious publication with a covering letter requesting the addressee to circulate it among others, when the same was intercepted by another person and never reached the addressee, constitutes an attempt within the purview of s. 124A of the Penal Code.

THE appellant was tried before Babu Umesh Chandra Sen, Deputy Magistrate of Malda, on a charge under s. 124A of the Penal Code, and convicted and sentenced thereunder, on the 15th December 1910, to two years' rigorous imprisonment. The prosecution story was that Surendra made manuscript copies of certain seditious printed articles and posted them, on the 13th August 1910, at the Punchanpur Post-office, addressed to Durjodhan Das, a student in the Malda Zilla School, with a covering letter requesting the addressee and others to circulate the same amongst others. The packet was intercepted by the Head-master and never reached the addressee. The fact of its having been posted by the appellant himself at the post-office was established by the Post-master and the *khas-mahal* tahsildar. The handwriting of the manuscript was proved by direct evidence, by a comparison of the disputed writing with the admitted or proved writing of the appellant, and by circumstantial evidence. The printed originals of the manuscript copies were discovered in a locked bag belonging to him, the key of which he produced himself: while the paper of the incriminating copies corresponded exactly in texture, water-mark, and general appearance with the folded papers found in his possession.

Mr. B. C. Chatterjee and *Babu Debendra Nath Bhattacharjee*, for the appellant.

Mr. Sultan Ahmed (Offg. Deputy Legal Remembrancer), for the Crown.

CASPERSZ AND SHARFUDDIN JJ. The appellant, Surendra Narayan Adhicary, has been convicted under

1911

SURENDRA NARAYAN ADHICARY v. EMPEROR.

section 124A of the Indian Penal Code, on a charge of sedition, in that he made manuscript copies of certain seditious writings and circulated them through the post to one Durjodhan Das, a student in the Malda Zilla School. It is conceded, and we have satisfied ourselves, that the writings are seditious. But it has been urged by learned counsel for the appellant, *first*, that the appellant did not post or publish the packet in question; *secondly*, that he did not write the incriminating matter; and, *thirdly*, that the sentence of two years' rigorous imprisonment is too severe, because the seditious writings were intercepted by the Head-master and were not read by the addressee.

We have examined the evidence, and in our opinion the facts are beyond all reasonable doubt. The Post-master proves that the packet was posted at his office, and he saw the appellant, with whom he was acquainted, at his post-office on a market day, the 13th August 1910 (the date of posting the packet), being such a day. The *khas-mahal* tahsildar gives similar evidence, and we believe these witnesses. Moreover, it is not necessary to prove the actual fact of posting in a case as this. In *Reg.* v. *Lovett* (1), which was a case of seditious libel, it was ruled that if the manuscript of a libel be proved to be in the handwriting of the defendant, and it be also proved to have been printed and published, this is evidence to go to the Jury that it was published by the defendant, although there be no evidence given to shew that the printing and publication was by the direction of the defendant. The Jury found Lovett guilty.

The substantial question in this case is whether the appellant wrote the manuscript papers. As to this, there is direct evidence and the evidence of comparison of the handwriting with the admitted or

(1) (1839) 9 C. & P. 462.

proved handwriting of the appellant. There are also certain circumstances connecting the appellant with contents of the packet sent to Durjodhan Das.

The appellant was a private tutor, and three of his pupils have deposed to having seen him write. They say that the manuscript papers are in his handwriting, and that they saw him write them. The relation of tutor and pupil is an intimate one; the appellant and these boys were constantly together, and the appellant had no reason to apprehend that his pupils were watching his proceedings, which he conducted unsuspectingly. In the circumstances we think that the three witnesses are witnesses of truth. They are also amply corroborated. In no sense were the boys accomplices of the appellant in the commission of the offence of sedition. It has been urged that the statements made by the boys to the Police Inspector were not produced in Court. But we accept the explanation that no statements were recorded; the Inspector made notes for his report, and the provisions of section 161 of the Code of Criminal Procedure were not followed.

Then, there is the evidence of comparison of handwritings. Mr. Hardless, Junior, the expert witness, has deposed to the identity. He no doubt has received a training on the subject. But he has not much experience, his age being only 22, and he does not know Bengali to any great extent. We have preferred to make the comparison for ourselves, and, so far as we can see, the writing in the seditious papers is that of the appellant. We may add that the deposition of the expert witness is very illegible, and that his cross-examination was stopped by the Magistrate for reasons which we do not appreciate. With regard to the papers with which the comparison has been made, there is no denial that they were written by the

1911

SURENDRA NARAYAN ADHICARY v. EMPEROR.

appellant; a comparison may, therefore, be legitimately made with these papers.

Lastly, the circumstantial evidence that the appellant wrote the seditious papers is exceedingly strong. The printed originals of the manuscript copies sent to Durjodhan Das were found in the locked bag of the appellant, and he produced the key of that bag. The paper of the copies, in texture, water-mark, and general appearance, corresponds exactly with the folded papers found in the possession of the appellant. The judgment of the Magistrate deals fully with the various details of the case for the Crown, and we need not consider it further.

On the question of sentence, we observe that the appellant is a young man, and that his offence amounted to an attempt only. Section 124A, however, includes an attempt in the definition of the offence of sedition. Attempt does not imply success. The intention of the appellant is plain from the fact that his covering letter was addressed to Durjodhan and others, and from the direction to his addressees to circulate the seditious papers to others. The copies having been posted and sent on by the appellant, their further progress was independent of the volition or action of the appellant.

The corruption of the minds of the young, whether by means of obscene matter or seditious writing, is a most serious offence. The appellant has never expressed any contrition. In these views, we are unable to find any principle on which the severity of the sentence passed can be diminished. The appellant was working on a system; his offence was not a solitary lapse from the dictates of law and loyalty.

Affirming the conviction and sentence, we dismiss this appeal.

E. H. M. *Appeal dismissed.*

PRIVY COUNCIL.

MAHOMED IBRAHIM HOSSAIN KHAN

v.

AMBIKA PERSHAD SINGH.

P.C.* 1911 Nov. 3, 7, 8; 1912 Jan. 16.

[ON APPEAL FROM THE HIGH COURT AT FORT WILLIAM IN BENGAL.]

Mortgage—Sale of mortgaged property—Prior mortgage, extinguishment of—Intention of parties—Effect of payment of prior mortgage by subsequent mortgagee—Res judicata—Omission to raise issue in former suit when party thereto—Civil Procedure Code (Act XIV of 1882), s. 13, expl. (2)—Transfer of Property Act (IV of 1882), s. 85—Parties to mortgage suits—Limitation Act, 1877, Sch. II, Art. 132.

In a suit brought on a simple mortgage deed, dated 17th February 1888, to recover Rs. 12,000 and interest, and to have it declared that the properties covered by the mortgage in suit, and by a *zarpeshgi* deed, dated 20th November 1874, were liable for the decretal amount, it appeared that by the deed of 1874 the properties in suit were hypothecated as security for Rs. 12,000, the mortgagee to have possession until the amount was repaid in 1887. Subsequently, on dates intermediate between 20th November 1874 and 17th February 1888, three of the properties in suit (the only properties concerned in this appeal) were further charged by simple mortgages, some of them relating only to two of such properties, and one of them relating only to the third of such properties, and suits on them were brought on 6th September 1888, 3rd May 1890, and 15th July 1890, and decrees for sale were obtained in them, the mortgagee of the mortgage in suit of 17th February 1888 or her representatives being made parties only to those suits and decrees which related to two of the properties mortgaged. The mortgage in suit was repayable in two years, and was, by agreement of the parties to it, made for the express purpose of paying off the debt of Rs. 12,000 on the *zarpeshgi* deed of 1874, and charged the same properties as were hyphothecated by that deed. The money then borrowed was, on 15th July 1888 in accordance with the agreement, applied in discharging the debt in the *zarpeshgi* deed, and that deed was then given up to the mortgagee of the mortgage in suit ; and her representatives, on 16th June 1891, assigned the mortgage in suit to the plaintiffs, who on 22nd September 1900

* *Present* : Lord Macnaghten, Lord Robson, Sir John Edge and Mr. Ameer Ali.

1912

MAHOMED IBRAHIM HOSSAIN KHAN v. AMBIKA PERSHAD SINGH.

instituted the present suit making defendants the representatives of the mortgagors, the representatives of the mortgagee, and the persons whose titles as decree-holders and purchasers arose under the intermediate mortgages made between 20th November 1874 and 17th February 1888, claiming priority over the last set of defendants :

Held, that, under the circumstances, the mortgagee of the mortgage in suit intended to keep alive for her benefit the charge created by the *zarpeshgi* deed of 20th November 1874, notwithstanding that no formal assignment in writing of that deed was made ; and she thereby obtained priority over the mortgagees of the intermediate further charges.

Dinobundhu Shaw Chowdhry v. *Jogmaya Dasi* (1), followed.

Held, also, that in any case, she was, under section 85 of the Transfer of Property Act (IV of 1882), a necessary party to all the suits on the intermediate mortgages, and consequently in the suits to which she or her representatives were made parties, her rights under her mortgage were barred by explanation (*2*) of section 13 of the Civil Procedure Code (Act XIV of 1882) by her omission in those suits to put those rights in issue ; though such rights were not affected by the decree in the suit to which she or her representatives were not made parties.

But, *held*, further, that the appellants' rights of priority under the *zarpeshgi* deed of 1874 were barred by Art. 132 of the Limitation Act (XV of of 1877), the present suit to enforce them not having been instituted within 12 years from the date when the money under that deed became repayable in 1887.

Held, therefore, that they were only entitled in the present suit to a decree for redemption of their interest in the third property, the subject of the suit, to which their assignors had not been made parties.

APPEAL from a judgment and decree (3rd March 1905) of the High Court at Calcutta, which varied a decree (9th July 1902) of the Court of the Second Subordinate Judge of Patna.

The plaintiffs were the appellants to His Majesty in Council.

The suit out of which this appeal arose was a suit for sale on a simple mortgage dated 17th February 1888, of which the plaintiffs were assignees. The principal defendants were purchasers of portions of the mortgaged property under decrees on prior

(1) (1901) I. L. R. 29 Calc. 154 ; L. R. 29 I. A. 9.

mortgages. The plaintiffs claimed that under the circumstances of the case they were entitled to priority over these defendants. The Subordinate Judge held that the plaintiffs were entitled to priority in respect of part of the debt secured by their mortgage. The High Court, on appeal, held that they were not so entitled.

The defendants in the suit were (1) Jagatmohini Dasi, the representative in interest of the mortgagors and one of the respondents in this appeal; (2, 3 and 4) Yakoob Hossain, Umatul Fatima and Anis Fatima, the son and daughters, and as such legal representatives of Musammat Alfan, deceased, mortgagees and assignors of their interest to the plaintiffs (appellants); (5) Gajadhur Mahto, a puisne mortgagee of one of the mortgaged properties; (6) Lalji Mahto, the purchaser of the last-mentioned property at the sale under a mortgage decree obtained by Gajadhur Mahto; (7) Dwarkanath Roy, the son and representative in interest of one Jagat Tarini Dasi, a puisne mortgagee of another of the mortgaged properties, and the purchaser thereof at a sale under a mortgage decree obtained by him; (8) Baijnath Singh; and (9—13) certain other Singhs, the co-sharers and representatives in interest of Jagarnath Singh, Raghunath Singh and Ganpat Singh, also puisne mortgagees of two of the mortgaged properties and purchasers thereof at a sale under mortgage decrees obtained by them. Subsequently to the filing of the suit two further defendants were added—(14) Sohus Koer, wife of the defendant-respondent, Gajadhur Mahto, claiming under a tenure created by the defendant Lalji Mahto; and (15) Jhumak Mahto, the assignee and purchaser of the interests of the respondent Dwarkanath Roy in one of the mortgaged properties.

The facts were that one Nanda Kumar Singh and his wife Lalpeari Dasi were the owners of, amongst

1912

MAHOMED IBRAHIM HOSSAIN KHAN v. AMBIKA PERSHAD SINGH.

others, the following properties in district Patna :— No. 20, Alipur Bakhri ; No. 360, Fatehpur-Lawaech ; Nos. 362 and 364, Ghowspur Dopahra ; No. 11, Chak Abdul Ghani ; No. 16, Chak Shah Mahomed ; and Nos. 385 and 386, Dhirajpur. On 20th November 1874 they executed in favour of Girwar Singh a *zarpeshgi* deed for the sum of Rs. 12,000, hypothecating these eight properties. Under the deed and the lease and its counterpart exchanged between the parties, Girwar Singh was to have possession as lessee for 12 years, was to pay the Government revenue, and Rs. 299-2-6 to the mortgagors as rent, and to appropriate Rs. 900 as interest on the money advanced by him. The *zarpeshgi* further provided that Girwar Singh was to continue in possession even after the lapse of 12 years, as long as the debt was not paid. Girwar Singh was put in possession.

On this appeal no question arose as to five out of these eight properties, because under the decree made in the first Court in favour of the appellants, and not affected by the decree of the High Court, those five were ordered to be sold in due course. Only three, therefore, out of the eight items of mortgaged property form the subject-matter of this appeal, namely—(*a*) the mortgagors' shares in mouzas Nos. 362 and 364, Gowspur-Dopahra ; and (*b*) his share in mouza No. 360, Fatehpur-Lawaech.

Nanda Kumar Singh died not long afterwards, and his son and heir, Kishun Kumar Singh, on 15th December 1879 executed in favour of Jagat Tarini Debi a simple mortgage for Rs. 700, hypothecating a two-anna share of estate No. 362, Ghowspur-Dopahra.

On 31st December 1880, Kishun Kumar Singh and his mother Lalpeari Dasi jointly executed in favour of Raghunath Singh and Ganpat Singh a simple mortgage for the sum of Rs. 3,200, hypothecating, amongst

others, the estates Nos. 362 and 364, Ghowspur-Dopahra. This was followed by another simple mortgage dated 20th December 1883 of the same properties, as well as other properties, in favour of Jagarnath Singh and Raghunath Singh for the sum of Rs. 2,000.

On the 7th January 1888, Kishun Kumar Singh alone executed a simple mortgage for the sum of Rs. 2,500 of a one-third share of estate No. 260, Fatehpur Lawaech, in favour of Gajadhur Mahto.

In the meantime Girwar Singh died, and his sons Sri Kishan Singh and others came into possession of the properties covered by the *zarpeshgi* of 1874. The period of 12 years expired in 1294 F.S. (1887), and as the mortgagors failed to pay the mortgage-money, Sri Kishan Singh and his brothers continued in possession. There were constant disputes between the parties, and on the 17th February 1888 Kishun Kumar Singh alone obtained from Musammat Alfan a loan of Rs. 12,000 for the express purpose of liquidating the *zarpeshgi* debt. He executed in her favour a simple mortgage of the properties covered by the *zarpeshgi* deed, But the *zarpeshgi* debt was not immediately paid off with the money. Kishun Kumar Singh appropriated to his own use Rs. 395-2-2, deposited in a bank Rs. 2,600 to his own credit, and tendered to the heirs of Girwar Singh, and deposited in the Court of the first Subordinate Judge of Patna to their credit Rs. 9,004-13-10 for the satisfaction of the *zarpeshgi* debt. The heirs of Girwar Singh, however, did not take out the money deposited in Court, as it was not sufficient for payment of the *zarpeshgi* debt. Thereupon Kishun Kumar filed a petition for withdrawal of the money in Court. Musammat Alfan apprehended that Kishun Kumar might himself appropriate the money after withdrawing it from Court, instead of repaying the *zarpeshgi* debt with it. Kishun

1912

MAHOMED IBRAHIM HOSSAIN KHAN v. AMBIKA PERSHAD SINGH.

Kumar and Musammat Alfan, however, came to terms, and on the 22nd June 1888 they jointly presented a petition to the Subordinate Judge, asking that the money deposited in Court might be made over to two pleaders named in it, who would appropriate the money towards payment of the *zarpeshgi* debt or such other charges, from which the properties should be released to enable Musammat Alfan to have the benefit of a charge free of the *zarpeshgi* on the properties mortgaged to her. It was not until the 15th July that the heirs of Girwar Singh received the money in satisfaction of the *zarpeshi* and returned the *zarpeshgi* deed. It does not, however, clearly appear what was the exact amount paid to them.

On the 6th September 1888, Gajadhar Mahto instituted a suit on his mortgage of the 7th January 1888, making the mortgagor Kishun Kumar Singh the sole defendant. He did not make Musammat Alfan a party. On the 6th September following he obtained a decree for sale. The mortaged property was sold on the 16th December 1889 and was purchased by Lalji Mahto. The sale was confirmed on the 22nd March 1890, and the purchaser obtained possession shortly afterwards. Kishun Kumar Singh's attempt to have the sale set aside by suit was unsuccessful.

Dwarka Nath Roy, son and heir of Jagat Tarini, on the 3rd May 1890, instituted a suit (28 of 1890) on the mortgage of the 15th December 1879 in favour of his mother. The mortgagor, as well as the puisne mortgagees, including the heirs of Musammat Alfan, who was then dead, were made defendants in the suit. Musammat Alfan had died in 1889, leaving a son, Mahomed Yakub, and two daughters, Anis Fatima and Umatul Fatima, as her heirs. Dwarka Nath Roy on the 20th November 1890 obtained a decree for sale. The proceedings in the suit show that the suit

was originally decreed against the mortgagor alone; Dwarka Nath applied for a re-hearing, and a re-hearing was allowed. Fresh summonses were issued against Yakub, Anis Fatima and Umatul Fatima and other absent defendants; proof of due service of summonses was adduced, and the suit was decreed against all the defendants. On the 23rd June 1892, notices under section 248 of the Code of Civil Procedure were issued to the defendants to show cause why the decree dated the 20th November 1890 should not be executed. The notices were reported to have been duly served. No cause was, however, shown. The mortgaged property was sold and was purchased by Dwarka Nath Roy himself, and on the 24th February 1899 he sold it to Jhumak Mahto. Dwarka Nath Roy and Jhumak Mahto were successively in possession of the property.

On 15th July 1890, suits 72 and 75 of 1890 were brought by the respondents, the Singhs, in the Court of the Subordinate Judge of Patna, and suits 73 and 74 of 1890 in the Court of the Subordinate Judge of Bankipore, on their mortgages of 31st December 1880, and 20th December 1883 of the shares of mouzas Nos. 362 and 364, Ghowspur-Dopahra against Kishun Kumar Singh, Dwarka Nath Roy and the representatives of Musammat Alfan. On 30th January 1891, decrees were made in those suits in both Courts (the defendants, the representatives of Musammat Alfan not appearing therein) for the sale of the mortgaged property conditional only on the then plaintiffs redeeming the prior mortgage thereon of 15th December 1879 in respect of which the then defendant, Dwarka Nath Roy, had already obtained the decree of 20th November 1890 in suit 28 of 1890 to which the Singhs were parties as subsequent incumbrancers with the right to redeem.

1912

MAHOMED IBRAHIM HOSSAIN KHAN v. AMBIKA PERSHAD SINGH.

On 11th February 1892, a notice under section 248 of the Code of Civil Procedure was directed by the Bankipore Court to issue in suit 74 of 1890 to the defendants therein to show cause why the decree should not be executed, and again a similar notice on 18th July 1896: and also on 12th July 1896 a similar notice was issued in suit 73 of 1890.

On 25th November 1896, the mouza No. 364, Ghowspur-Dopahra, was sold under the decree for Rs. 19,000, and was purchased by the decree-holders, the Singhs, and on 29th January 1897 a certificate of sale of that property under section 316 of the Code of Civil Procedure was granted to them by the Court.

In the meantime, on 16th June 1891, Yakub Hossain, Umatul Fatima and Anis Fatima assigned to the present appellants the mortgage of 17th February 1888 executed by Kishun Kumar Singh in favour of their mother Musammat Alfan; and at the same time made over to them the original *zarpeshgi* lease of 20th November 1874 which had been and remained in their possession.

The appellants as assignees instituted on 22nd September 1900 the suit out of which the present appeal arose to enforce the mortgage of 17th February 1888 by sale of the hypothecated properties. The plaintiffs sought to have the benefit of the mortgage covered by the *zarpeshgi* deed of 20th November 1874 executed by Nanda Kumar Singh and Lal Peari Dasi in favour of Girwar Singh, and claimed priority to the mortgages executed by either Kishun Kumar Singh alone or by him and Lalpeari Dasi, between the dates of the *zarpeshgi* and the mortgage of 1888 in favour of Musammat Alfan.

The plaint prayed for a decree for Rs. 12,000 with interest; for a declaration that the properties covered by the *zarpeshgi* lease as well as by the bond in suit

were liable for payment of the amount decreed; and for a direction that the defendant the representative of the mortgagor, and the puisne encumbrancers Dwarka Nath Roy, Gajadhar Mahto and the Singhs should redeem within a fixed time, and in default of their doing so the mortgaged properties should be sold.

The defence so far as it was now material appears from the following issues:—(2) Whether the judgments obtained by Baijnath Singh and others referred to in the plaint were fraudently obtained as alleged in it; and, if so, are they a bar to their suit under section 13, Civil Procedure Code, 1882? (4) Whether the plaintiffs are the purchasers of the mortgage bond in suit? (5) Whether the purchase is invalid by reason of its having been affected after the decree of Baijnath Singh and others? (6) Whether the alleged *zarpeshgi pattah* in favour of Girwar Singh was a genuine instrument for consideration; and, if so, whether it operated as a mortgage, and whether the *zarpes gi* debt subsisted at the date of the mortgage bond in suit? (7) Did the plaintiffs' alleged vendor acquire the property claimed by payment of the *zarpeshgi* money of Girwar Singh? (9) Whether the plaintiffs can recover the amount of interest claimed? and (10) What relief, if any, can the plaintiffs get?

On these issues the Subordinate Judge held to the following effect:—On the second issue he was not satisfied that the summonses and notices of execution in the suits had been properly served on the heirs of Musammat Alfan, and held that the decisions in those suits did not operate as a bar to the present suit; on the fourth and fifth issues he held that the plaintiffs had taken the assignment of the mortgage for value, and that there was no contentious suit pending at the time of the plaintiff's purchase, and therefore the

1912

MAHOMED IBRAHIM HOSSAIN KHAN v. AMBIKA PERSHAD SINGH.

rule of *lis pendens* was inapplicable. Both parts of the sixth issue he found in favour of the plaintiffs, and was of opinion that it was clearly the intention of the parties that the incumbrance created by the *zarpeshgi* deed should subsist to Musammat Alfan and be kept alive for her benefit; and on that ground he decided the seventh issue in favour of the plaintiffs, and held that the contesting defendants were entitled to redeem. On the ninth issue he held that the plaintiffs were not entitled to interest on the footing that the *zarpeshgi* lease had been kept alive; and on the tenth that the contesting defendants were respectively entitled to redeem the properties purchased under the decrees on payment of one-third of the *zarpeshgi* money in respect of each. In the result his decree was for sale of the mortgaged property making provision for the right to redeem which the contesting defendants were held to possess.

Three appeals were brought from this decision by the various sets of defendants, and the plaintiffs filed objections under section 561 of the Civil Procedure Code. The High Court on appeal [RAMPINI and SARADA CHARAN MITRA JJ.] held that the summonses and notices in the mortgage suits brought by Dwarka Nath Roy and the Singhs had been in fact duly served on the representatives of Musammat Alfan, and reversed the finding of the Subordinate Judge on that issue. They held that by reason of those suits the plaintiffs were barred by section 13 of the Civil Procedure Code from setting up title as prior mortgagees on the basis of the *zarpeshgi* deed of 1874: and that even if they could have set up such title the present suit to assert it, commenced as it was more than 12 years after possession under the *zarpeshgi* lease had been given up, was barred. On the question whether the plaintiffs were otherwise entitled to priority on the

footing of their having paid off the *zarpeshgi* lease which they held depended on the intention of the parties, the High Court gave their decision in favour of the contesting defendants.

The material portion of the High Court judgment was as follows :—

There was no contention in the lower Court, nor is there any before us as regards the right of the plaintiffs to proceed against the mortgaged properties other than those that have been sold under the mortgage decrees in favour of Gajadhar Mahto, Dwarka Nath Roy and Baijnath Singh and his co-parceners, the heirs of Raghunath Singh and Ganpath Singh. The only questions which now arise are—Had the plaintiffs priority on the basis of the *zarpeshgi* deed of 20th November 1874 ; and if they had, are they barred from enforcing the same ?

The lower Court answered the first of these questions in the affirmative and granted the plaintiffs a decree directing a sale of all the properties covered by the *zarpeshgi* of 1874 and the mortgage to Alfan, with the reservation that if the contesting defendants paid in certain proportions Rs. 12,000, the principal sum covered by the *zarpeshgi*, estates Nos. 364 and 362, Ghowspur-Dopahra, and 360, Fatepur-Lawaech, would be released from liability under the decree.

These appeals have been presented by the three sets of mortgagees and purchasers.

There is no question now as to the facts we have stated above. The allegation of fraud made in the plaint against the contesting defendants was not made out, and it is conceded that there is no proof in support of such a case, except that the allegations of the defendants as to the services of summons and notices on Yakub, Anis Fatima and Umatul Fatima, were not substantiated. As regards the latter point, the finding of the lower Court is in favour of the plaintiffs, and the first contention raised before us on behalf of the appellants in appeals Nos. 307 and 351 is that this finding is erroneous.

The contention of the appellants seems to us to be correct. Yakub and Umatul Fatima, no doubt, deny the receipt of any summonses either in the suit of Dwarka Nath Roy or in those of Baijnath Singh and others, and Anis Fatima is dead ; but Yakub admits receipt of notices under section 248 of the Code and he had full knowledge of the possession of the purchasers under the decrees for sale. The proceedings in the suits were perfectly regular ; there is no proof of any attempt to conceal the fact of the institution of the suits or of the taken out of the execution proceedings. Of the three heirs of Alfan, Yakub was the managing member, and there can be no

1912

MAHOMED IBRAHIM HOSSAIN KHAN *v.* AMBIKA PERSHAD SINGH.

doubt on the evidence that he had full knowledge of the proceedings in the suits. He and his sisters were also co-sharers as regards some of the hypothecated properties with Kishun Kumar, and after the sales they became co-sharers with the purchasers, the contesting defendants. The process records are destroyed, and it is difficult after the lapse of more than 12 years to prove facts by oral evidence only. The present suit was commenced more than 12 years after the date of the mortgage to Alfan and more than 10 years after the due date as also of the alleged service of the summonses. The plaintiffs are themselves to blame for the destruction of evidence and consequential imperfection in the evidence now adduced. The circumstances and probabilities are, however, more in accordance with the defendants' allegation of due service than with the denial of Yakub and Umatul Fatima.

Yakub and Umatul Fatima cannot be implicitly relied on. They show evident bias towards the plaintiffs, and their depositions contain palpable traces of prevarication. The very fact that Yakub, who was admittedly familiar with Courts of Law, did not stir, notwithstanding his full knowledge of the execution proceedings, goes against his truthfulness on the point. He remained quiescent, and did not inform the plaintiffs of the institution of the suits at the time of the assignment to them. The plaintiffs, who are bound by the result of the litigations, having obtained the assignment after the commencement of the suits, have not come forward to deny their own knowledge of the suits. They are residents of Patna, have frequent cases in the local Courts, and it is not easy to believe that they or their agents had no knowledge of the sales in Court of properties hypothecated to them. The denials of Yakub and Umatul Fatima are not sufficient to rebut the presumption as to the regularity of the proceedings and the due service of summonses and notices. As we have seen, the Court was satisfied that the summonses had been duly served.

Badshahi Lal, Gandouri Singh and Jawahir Lal have been examined by the defendants to prove service of summonses. They were deposing to events which had taken place nearly 12 years before, and it is most likely that they would forget much and make statements which would seem to be conflicting. The criticism of the lower Court on their evidence is not justifiable under the circumstances. Leaving aside the details, we have every reason to come to the conclusion that their evidence is substantially true and they make out a case which has not been rebutted.

It has also been contended by the learned vakils for the appellants that the plaintiffs were incompetent on the ground of limitation from now attempting to re-open the proceedings on the ground of non-service of summonses on their assignors. If their assignors, the defendants Yakub and his sisters, had applied to set aside the *ex parte* decrees against them,

they would have been hopelessly barred by the rule of limitation (Art. 164 of the second Schedule of the Indian Limitation Act). The plaintiffs, who are bound by the doctrine of *lis pendens* in the same way as their assignors, would also be barred from re-opening the *ex parte* decrees. But it is said that they do not seek to re-open the decrees by applications under section 108 of the Code, and there is no rule of limitation which bars them from proving facts to show that the decrees do not bind them. But the decrees are admissible as evidence against them, unless they can show that the non-service of summonses detracts from their evidentiary value and binding character. No man ought to be allowed to have the benefit of an act done indirectly, when the law would not permit him to do it directly.

What then is the effect of the decrees passed against Yakub and his sisters? They were made parties as puisne mortgagees who had the right to redeem. The plaintiffs asked for sale of the mortgaged properties free from the liens of all the puisne mortgagees. The Court in the cases of Baijnath Singh and others directed that the property mortgaged to Dwarka Nath Roy should not be sold, unless the money payable to him was deposited in Court, as it was found he was a prior mortgagee. Yakub and his sisters did not set up their title as prior mortgagees on the basis of the *zarpeshgi* of 1874, the ground of relief in the present action. If they had the title now set up by the assignees, their omission to raise it in the previous suits is under section 13, explanation II of the Code of the Civil Procedure, a bar to the plaintiffs now relying on their prior mortgage, even if they could get the benefit of a prior mortgage. In *Sri Gopal* v. *Pirthi Singh* (1) the Judicial Committee in affirming the decision of the Full Bench of the Allahabad High Court (2) approved of the following observation in the judgment of that Court:—"In our opinion not only might the representatives of Iswar Das (the prior mortgagee) have pleaded their mortgage of the 7th February 1874, but they ought to have done so. They not having done what they might and ought to have done as an answer *pro tanto* to the suit of Sriram (the puisne mortgagee), we are of opinion that section 13 of the Code of Civil Procedure applies."

The same view has been taken by this Court in *Baranashi Pershad Chowdhury* v. *Johori Lal* (3), and in *Gopal Lal* v. *Banarashi Pershad Chowdhury* (4). We are therefore of opinion that the plaintiffs are precluded from setting up a prior mortgage against the defendants, the Singhs and Dwarka Nath Roy (appellants in Appeals 307 and 351).

The next question argued before us relates to limitation, the contention of the defendants being that any claim under the *zarpeshgi* of 1874 is

(1) (1902) I. L. R. 24 All. 429; L. R. 29 I. A. 118.
(2) (1897) I. L. R. 20 All. 110.
(3) (1903) 8 C. W. N. 385.
(4) (1904) I. L. R. 31 Calc. 428.

1912

MAHOMED IBRAHIM HOSSAIN KHAN *v.* AMBIKA PERSHAD SINGH.

hopelessly barred. The term of the *zarpeshgi* expired in Jeth 1294 F.S. (May or June 1887). The possession of the mortgagees, however, continued, as contemplated by the deed, up to the 1st July 1888, when the debt was satisfied and the mortgagees gave up possession. The present suit was commenced on 22nd September 1900, that is, more than 12 years after the mortgagees ceased to enjoy the usufruct of the hypothecated properties. The present suit, however, is within time, if the period be calculated from the date the mortgage money under the bond to Alfan became due. If the position of the plaintiffs either in law or on the application of equitable principles be that of the assignees of the *zarpeshgi*, and the present suit be considered as one for realization of the mortgage money covered by it, the suit is evidently barred. If, as is contended, the payment of the *zarpeshgi* debt by Alfan had the effect of subrogation, the plaintiffs are bound by the same rules of law and equity as the original mortgagees, and the suit, in so far as it is on the footing of the *zarpeshgi*, would seem to be barred.

But it is contended by the learned vakil for the plaintiffs that their suit is based on the mortgage in favour of Alfan, and they merely rely on an equity arising from the fact of Alfan having discharged the *zarpeshgi* debt, and reliance is placed on the finding as regards limitation in *Baranashi Pershad Chowdhury* v. *Johori Lal* (1) as an authority in support of the contention. The facts of the present case as regards limitation are, however, not quite similar to those of *Baranashi Pershad Chowdhury* v. *Johori Lal* (1), and as the decision of that case rested on another point, the observations of the Court in favour of the plaintiffs on the point of limitation were *obiter dicta*, and we do not think that case can be cited as an authority against the view we are now disposed to take.

The last and most important question raised in the case relates to the right of the plaintiffs to claim relief on the footing of the *zarpeshgi*. The question being one of the intention of the parties to the mortgage which is now directly in suit is essentially a question of fact. *Mohesh Lal* v. *Bawan Das* (2), *Gokaldas Gopaldas* v. *Puranmal Premsukhdas* (3), and the other cases, referred to by the lower Court and cited before us, lay down the principles which should guide us in determining the intention of the parties. The presumption is that the subsequent mortgage intended to keep alive the prior mortgage which has been discharged with the money advanced by him, and he is entitled to use the prior mortgage as a shield against intermediate incumbrances. But the presumption may be rebutted, and in each case we are to look to its own facts and circumstances in coming to a

(1) (1903) 8 C. W. N. 385.
(2) (1883) I. L. R. 9 Calc. 961 ; L. R. 10 I. A. 62.
(3) (1884) I. L. R. 10 Calc. 1035 ; L. R. 11 I. A. 126.

conclusion. Very slight evidence may be sufficient to show that the subsequent mortgagee intended to keep alive what was certainly beneficial to him; but the nature of the two transactions might be quite dissimilar, there may be variation as regards the parties and there may also be other circumstances which may lead to a contrary presumption.

Now, the *zarpeshgi* of 1874 was a lease for 12 years, or until the mortgage debt was satisfied, with a clause hypothecating the leasehold properties. The sons of Girwar Singh had in fact possession until the debt was discharged some time after the stipulated period. The effect of the payment by Kishun Kumar Singh on the 13th July 1888 was to determine their possession. The mortgage to Alfan was of an entirely different character. After the 15th July 1888, Kishun Kumar Singh re-entered into possession, and Alfan had simply a lien under the mortgage to her.

There was also a variation as to the parties. Nanda Kumar Singh and Lalpeari had executed the *zarpeshgi;* the mortgage to Alfan was executed by Kishun Kumar alone. Lalpeari was evidently alive in 1888, as appears from the deposition of Doma Singh. Some of the other witnesses examined on the point have prevaricated, and we cannot place much reliance on their testimony. The rates of interest were also different.

The sum of Rs. 12,000 paid by Alfan went directly into Kishun Kumar's hands. It was not paid to the *zarpeshgidars* until after the lapse of five months, and we have every reason to suppose that a sum much less than Rs. 12,000 was paid to them. Kishun Kumar, it would seem, appropriated nearly Rs. 3,000. The tender and deposit by Kishun Kumar of the sum of Rs. 9,004-13-10 only and the acts and conduct of the parties with reference to the withdrawal of the amount from Court also go against the hypothesis of an intention to keep the *zarpeshgi* alive. The petition of the 22nd June 1888 and the statements of the witnesses with reference to it and the transactions relating to the mortgage to Alfan and payment to the heirs of Girwar Sing evince the anxiety of Alfan and her advisers to obtain a title free of the *zarpeshgi* encumbrance and nothing further. The making over of the deed to Alfan also points to the same conclusion.

The lower Court has placed no reliance on the oral evidence adduced in support of the case of the plaintiffs as to the intention of the parties. Our attention has been drawn to it, but we do not see our way to accept it as of any value, and we accordingly discard it.

The conduct of the heirs of Alfan in their omitting to assert any claim in the suits on mortgages of dates anterior to theirs is the strongest evidence against them, as affording unmistakeable indications of their apathy consequent on a consciousness that they had no right to fall back on the *zarpeshgi*. In fact we do not find any trace of an intention on their part or the plaintiffs to keep the old mortgage alive. They slept over the matter for 12 years,

1912

MAHOMED IBRAHIM HOSSAIN KHAN v. AMBIKA PERSHAD SINGH.

and the right has been for the first time asserted in the present suit. We cannot allow the plaintiffs after this lapse of time, when other rights have grown up without the slightest objection or action on their part, to take advantage of a stale claim.

We accordingly decree the appeals, direct the decree of the lower Court be varied by omission of the order as to the sale of the estates Nos. 362 and 364, Ghowspur-Dopahra, and No. 360, Fatepur-Lawaech, and dismiss the suits with costs in both Courts against the defendants.

On this appeal,

Sir Erle Richards, *K. C.*, and *A. M. Dunne*, for the appellants, contended that they were entitled to the benefit of the charge on the mortgaged properties under the *zarpeshgi* lease of 20th November 1874, which, it was submitted, had priority over the three sets of respondents. It was first contended that the effect of the transaction by which the *zarpeshgi* was paid off in 1888 was that the mortgage was not extinguished, but that it was kept alive for the benefit of Musammat Alfan, the appellants' assignor. Whether it was kept alive or not depended entirely on the intention of the parties. Reference was made to *Mohesh Lal* v. *Bawan Das* (1), and *Gokaldas Gopaldas* v. *Puranmal Premsukhdas* (2); in the latter of which cases their Lordships of the Judicial Committee declined to make the principle of the English cases applicable to India: see *Toulmin* v. *Steere* (3), *Adams* v. *Angell* (4), *Thorne* v. *Cann* (5), per Lord Herschell, and *Chetwynd* v. *Allen* (6). The presumption was, in the absence of evidence to the contrary, that a person paying off a mortgage intended to keep it alive for his own benefit. It was submitted that under the circumstances of, and on the evidence in, the present case the intention was that the mortgage should be kept alive: *Dinobundhu*

(1) (1883) I. L. R. 9 Calc. 961: L. R. 10 I. A. 62.
(2) (1884) I. L. R. 10 Calc. 1035; L. R. 11 I. A. 126.
(3) (1817) 3 Mer. 210.
(4) (1877) L. R. 5 Ch. D. 634.
(5) [1895] A. C. 11, 15.
(6) [1899] I. Ch. 353.

Shaw Chowdhry v. *Jogmaya Dasi* (1), and Transfer of Property Act (IV of 1882), section 83, were referred to. The form of the mortgage (*zarpeshgi*) was no obstacle to the appellants' claim. The Transfer of Property Act, section 58, which contained the definition of a simple mortgage, sub-section 6 of that section which gave the definition of a usufructuary mortgage, and section 98, which contemplated a combination of a usufructuary and a simple mortgage, were referred to, and also sections 67 and 100; and in the construction of such mortgages, *Kashi Ram* v. *Sardar Singh* (2), *Jafar Husen* v. *Ranjit Singh* (3), *Musaheb Zaman Khan* v. *Inayatullah* (4), and *Parbati Charan Roy* v. *Gobinda Chandra Kundu* (5). It had been rightly held by the first Court that the appellants' vendors, the representatives of Musammat Alfan, were not barred by the decrees made in the suits brought on the mortgages intermediate between the date of the *zarpeshgi* deed of 1874 and the 17th February 1888, the date of the mortgage in suit. Assuming that the summonses and notices were duly served and that they were really parties to those suits, it was submitted that the suits were no bar to the present suit under section 13 of the Civil Procedure Code, 1882. In the former suits the persons with the interests now represented by the appellants were joined as defendants merely because they were puisne mortgagees, who had as such a right to redeem. No issue arose in those suits which involved or affected their prior right and no relief was asked for by the persons suing which could exclude those rights. Their priority was not a necessary defence in those suits. Under section 85 of the Transfer of Property Act (IV of 1882), a prior mortgagee is

(1) (1901) I. L. R. 29. Calc. 154: L. R. 29 I. A. 9.
(2) (1905) I. L. R. 28 All. 157, 160.
(3) (1898) I. L. R. 21 All. 4
(4) (1892) I. L. R. 14 All. 513, 519.
(5) (1906) 4. C. L. J. 246, 249.

1912

MAHOMED IBRAHIM HOSSAIN KHAN v. AMBIKA PERSHAD SINGH.

not a necessary party to a suit by a puisne mortgagee. Only persons interested in the particular mortgage in suit are necessary parties, and the only persons having an "interest in the property comprised in the mortgage," within the meaning of the section, are those who have subsequent mortgages in the property, and therefore have a right to redeem. At the time they were made parties they had, moreover, assigned their rights to the appellants, and were not bound by the result, because they were unnecessarily made parties. There was, therefore, it was submitted, no issue raised in the former suits to which the prior right of the present appellants "ought to have been made a ground of defence". The two cases cited and relied upon by the High Court—*Gopal Lal* v. *Benarasi Pers'ad Chowdhry* (1) and *Sri Gopal* v. *Pirthi Singh* (2)—were distinguishable, because in these cases the plea that there was a prior mortgage was a necessary defence, the claim in one suit being that the mortgage security should be sold free from incumbrances, and in the other the issue as to priority of mortgages being expressly raised.

As to limitation, Arts. 132, 144 and 147 of Schedule II of the Limitation Act, 1877, were referred to. [*De-Gruyther, K. C.*, referred, as to Art. 147, to *Vasudeva Mudaliar* v. *Srinivasa Pillai* (3)], and it was contended that the loan made on 17th February 1888 was a money-charge on the property, and that charge it was sought to enforce in the present suit, and Art. 132 of schedule II of the Limitation Act, 1877, allowed 12 years from the date "when the money sued for became due." The due date was the expiry of the two years for which the mortgage in suit was made, that is,

(1) (1904) I. L. R. 31 Calc. 428, 431.
(2) (1902) I. L. R. 24 All. 429, 436; L. R. 29 I. A. 118, 123, 124.
(3) (1907) I. L. R. 30 Mad. 426; L. R. 34 I. A. 186.

February 1890, and the suit was brought in 1900, well within 12 years. Reference was made to *Miller* v. *Dell* (1).

DeGruyther, *K.C.*, and *Kenworthy Brown*, for the respondents (other than the defendants added *pro formâ*), contended that the appellants were not entitled to any rights as mortgagees or charge-holders on the footing of the deed of 1874: no rights were kept alive under it. The mortgage was merely a usufructuary mortgage, and a distinction was made between such mortgages and ordinary mortgages in the Transfer of Property Act: see section 58, clause (*b*), and section 62, clause (*a*); and as to usufructuary mortgages, sections 67, 68 and 99. In *Mohesh Lal* v. *Bawan Das* (2), which was in respect of a somewhat similar transaction to the present one, it was held by this Board that the intention was to extinguish the mortgage; and *Gokaldas Gopaldas* v. *Puranmal Premsukhdas* (3) was distinguishable from the present case. Reference was made to *Thorne* v. *Cann*(4), and it was submitted that, as held by the High Court, there was no evidence of any intention to keep the charge under the *zarpeshgi* lease alive, and that any presumption to the contrary was therefore rebutted. But in any case the assignors of the appellants were barred under the rule of *res judicata* from setting up any rights of priority on the footing of the *zarpeshgi* deed of 1874. In suits brought against them summonses and notices were duly served upon them, as had been found by the High Court. They were necessary parties to those suits. They might have set up their title as prior mortgagees or even their mortgage titles in those suits, but they omitted to do so, and by their omission they are now

(1) [1891] 1 Q. B. 468.
(2) (1883) I. L. R. 9 Calc. 961; L. R. 10 I. A. 62.
(3) (1884) I. L. R. 10 Calc. 1035; L. R. 11 I. A. 126.
(4) [1895] A. C. 11, 19.

1912

MAHOMED IBRAHIM HOSSAIN KHAN v. AMBIKA PERSHAD SINGH.

barred by those suits which were decided against them. Reference was made to *Sri Gopal* v. *Pirthi Singh* (1); Civil Procedure Code (1882), section 13, explanation (2); and *Gopal Lal* v. *Banarasi Pershad Chowdhury* (2). The appellants' assignors might have applied to set aside the sale within a year: see Art. 12 of Schedule II of the Limitation Act, 1877: but, on the principle laid down in *Malkarjun* v. *Narhari* (3), there would have been no irregularity; and that there was no fraud in the present case was decided by the High Court judgment. Section 108 of the Civil Procedure Code (1882), under which an *ex parte* decree may be set aside, was also referred to. The appellants never applied to set them aside. It was clear that the appellants on the ground of *res judicata* could not recover against two items of the property in suit: the case therefore should be treated as if they had released those items, and they must submit to a proportionate reduction of the debt; and the third item was in any view chargeable with a proportionate part of the debt. Reference was made to *Ponnusami Mudaliar* v. *Srinivasa Naickan* (4) and *Imam Ali* v. *Baijnath Ram Sahu* (5).

As to limitation, the suit was barred as having been brought more than 12 years after the mortgagees, that is the appellants' assignors, were out of possession under the *zarpeshgi* lease of 1874. That deed was either a mortgage or it was not. If not, section 57 of the Transfer of Property Act applied: see also section 100. If it was a mortgage, the present suit was entirely barred by the 12 years' period of limitation.

Sir Erle Richards, *K.C.*, replied.

(1) (1902) I. L. R. 24 All. 429; L. R. 29 I. A. 118.
(2) (1904) I. L. R. 31 Calc. 428.
(3) (1900) I. L. R. 25 Bom. 337, 346, 347; L. R. 27 I. A. 216, 224.
(4) (1908) I. L. R. 31 Mad. 333, 334.
(5) (1906) I. L. R. 33 Calc. 613, 621.

1912

MAHOMED IBRAHIM HOSSAIN KHAN *v.* AMBIKA PERSHAD SINGH.

Jan. 16.

The judgment of their Lordships was delivered by SIR JOHN EDGE. This is an appeal by the plaintiffs against the decree of the High Court of Judicature at Fort William in Bengal, dated the 3rd of March 1905, which varied the decree of the Subordinate Judge of Patna of the 9th of July 1902.

The suit was brought on the 22nd of September 1900, in the Court of the Subordinate Judge, on a simple mortgage of the 17th of February 1888, to recover Rs. 12,000 as principal, Rs. 23,150 as interest to the date of suit, and future interest until realization. That mortgage, as will later appear, was executed in favour of Musammat Alfan, whose heirs assigned it to the plaintiffs on the 16th of June 1891. The plaintiffs also claimed to have it declared that the properties covered by the mortgage of the 17th of February 1888, and by a *zarpeshgi* deed of the 20th of November 1874, were liable for the entire decretal amount; that certain of the defendants should be directed to pay the decretal amount to the plaintiffs within a time to be fixed by the Court, and that in default of payment the decretal amount should be realized by the sale by auction of the mortgaged properties included in the mortgage of the 17th of February 1888, and the *zarpeshgi* deed of the 20th of November 1874. Various issues were raised by the defendants, and much more or less conflicting evidence was recorded, but the facts, so far as they are material in the view taken by their Lordships, may be briefly stated.

On the 20th of November 1874, Nanda Kumar Singh on his own behalf, and as the husband and agent of his wife, Musammat Lalpeari Dasi, executed a *zarpeshgi* deed in favour of Girwar Singh for the sum of Rs. 12,000, which was acknowledged to have been received from Girwar Singh, and by that deed mortgaged and hypothecated as security for the *zarpeshgi*

1912

MAHOMED IBRAHIM HOSSAIN KHAN v. AMBIKA PERSHAD SINGH.

Rs. 12,000 certain properties which included the entire 16 annas of the *milkiat* and the *malguzari* right of mouzah Ghowspur-Dopahra, No. 364, 2 annas out of 16 annas of mouzah Ghowspur-Dopahra, No. 362, and 5 annas 4 pies out of 16 annas of mouzah Fatehpur-Lawaech. With the properties which are named above this appeal is alone concerned. By that deed Girwar Singh was entitled to hold possession of the properties hypothecated until the amount of the *zarpeshgi* Rs. 12,000 was repaid to him, and it was by the deed amongst other things agreed that Girwar Singh should pay certain expenses and the Government revenue, should keep out of the usufruct Rs. 900 every year as interest on the *zarpeshgi* Rs. 12,000, and should pay Rs. 501, 13 annas, 6 pies, on account of the rent every year by regular instalments to Nanda Kumar Singh and Lalpeari Dasi, and that all the increase in the produce in consequence of proper cultivation should be enjoyed and appropriated by Girwar Singh. It was also by the deed agreed that when Nanda Kumar Singh and Lalpeari Dasi should repay to the *ticcadar*, Girwar Singh, the *zarpeshgi* Rs. 12,000 in one lump sum at the end of Jeth 1294 Fasli (September 1887), the *ticca* transaction should be cancelled and Nanda Kumar Singh and Lalpeari Dasi should bring the leased properties into their direct possession, but in the case of the non-payment of the *zarpeshgi* Rs. 12,000 at the end of Jeth 1294 Fasli, the *ticca* transaction should stand good with all its conditions until the payment of the *zarpeshgi*. Girwar Singh was put in possession under the deed.

On the 15th of December 1879, Nanda Kumar Singh being then dead, his son and heir Kishan Kumar Singh executed in favour of Musammat Jagattarini Debi a simple mortgage of the 2 annas share in No. 362, Ghowspur-Dopahra. On the 3rd May 1890,

Dwarkanath Roy, who was the son and heir of Musummat Jagattarini, then dead, brought a suit for sale on the mortgage of the 15th of December 1879, and made the mortgagor and the puisne mortgagees, including the heirs of Musammat Alfan, who was then dead, defendants to his suit. Their Lordships, concurring with the High Court, find as a fact that the summonses and notices in that suit were duly served upon the heirs of Mussamat Alfan. The heirs of Musammat Alfan did not appear, and did not defend that suit. On the 20th of November 1890, Dwarka Nath Roy obtained in his suit a decree for sale, and under that decree the 2 annas share in No. 362, Ghowspur-Dopahra was sold.

On the 31st of December 1880, Kishan Kumar Singh and his mother Lalpeari Dasi executed a simple mortgage in favour of Raghunath Singh and Ganpat Singh of, amongst other properties, the 2 annas share in No. 362, Ghowspur-Dopahra, and the 16 annas share in No. 364, Ghowspur-Dopahra. On the 20th December 1883, Kishan Kumar Singh and Lalpeari Dasi executed in favour of Raghunath Singh and Jagarnath Singh a simple mortgage of, amongst other properties, the 2 annas share in No. 362, Ghowspur-Dopahra, and the 16 annas share in No. 364, Ghowspur-Dopahra. On the 15th July 1890, two suits for sale were brought, one on the mortgage of the 31st of December 1880 and the other on the mortgage of the 20th of December 1883. Their Lordships, concurring with the High Court, find as a fact that the heirs of Musammat Alfan were duly made defendants to these suits. The heirs of Musammat Alfan did not defend either of these suits. Decrees for sale were made in these suits.

On the 7th of January 1888, Kishan Kumar Singh executed in favour of Gajadhur Mahto a simple mortgage of the 5 annas 4 pies share in Fatehpur-Lawaech.

1912

MAHOMED IBRAHIM HOSSAIN KHAN v. AMBIKA PERSHAD SINGH.

On the 6th September 1888, Gajadhur Mahto brought a suit for sale on his mortgage of the 7th of January 1888 against Kishan Kumar Singh, but did not make Musammat Alfan a defendant. Gajadhur Mahto obtained a decree for sale; under that decree the 5 annas 4 pies share in Fatepur-Lawaech was sold on the 16th December 1889 to Lalji Mahto. The sale was confirmed on the 22nd of March 1890, and shortly afterwards Lalji Mahto was put in possession. Lalji Mahto died since this suit was brought.

In February 1888, Kishan Kumar Singh borrowed Rs. 12,000 at interest of Re. 1 and 4 annas per mensem from Musammat Alfan. Their Lordships find as a fact that the Rs. 12,000 was borrowed by Kishan Kumar Singh and was lent by Musammat Alfan for the express purpose of paying off the *zarpeshgi* debt of Rs. 12,000 as security for which the property mentioned in the *zarpeshgi* deed of the 20th November 1874 was mortgaged and hypothecated by that deed. In consideration of that loan of Rs. 12,000 Kishan Kumar Singh executed on the 17th of February 1888 in favour of Musammat Alfan a simple mortgage of the properties included in the *zarpeshgi* deed of the 20th of November 1874. The principal sum of Rs. 12,000 was under that mortgage repayable in two years. The money lent by Musammat Alfan was in accordance with the agreement between her and Kishan Kumar Singh applied in discharging the *zarpeshgi* debt of Rs. 12,000, and on the 15th of July 1888 the then holders of the *zarpeshgi* deed of the 20th November 1874 quitted possession and gave up the *zarpeshgi* deed, which was delivered to Musammat Alfan. Musammat Alfan died on the 10th of December 1889, and on the 16th of June 1891 her heirs assigned the mortgage of the 17th of February 1888 to the plaintiffs, who are the appellants here. On that

assignment such rights as Musammat Alfan had acquired and were then existing passed to the plaintiffs.

On the 22nd of September 1900, the plaintiffs, in whom was then vested Musammat Alfan's right as mortgagee under the mortgage of the 17th of February 1888, filed their plaint in this suit, making then, or by subsequent amendment of their plaint, the representatives of Kishan Kumar Singh, who was then dead, and others who were interested in the mortgage properties or in some of them, defendants. The titles of the defendants, other than the representatives of Kishan Kumar Singh, arose under the mortgages which were made subsequently to the 20th of November 1874 and prior to the 17th of February 1888.

The Subordinate Judge decreed the suit for sale with costs, giving the defendant No. 1 a right to redeem the mortgage so far as it affected the properties other than No. 362, Ghowspur-Dopahra, No. 364, Ghowspur-Dopahra, and Fatehpur-Lawaech by payment within 90 days of the decretal amount with costs. The defendants Nos. 8 to 13 were given a right to redeem the mortgage, so far as it affected No. 364, Ghowspur-Dopahra, by payment within 90 days of Rs. 4,000 with proportionate costs; the defendant No. 15 was given a right to redeem the mortgage, so far as it affected No. 362, Ghowspur-Dopahra, on payment of Rs. 4,000 with proportionate costs; and any of the defendants Nos. 5, 6 and 14 were given a right to redeem the mortgage, so far as it affected Fatehpur-Lawaech, on payment within 90 days of Rs. 4,000 with proportionate costs. The High Court on appeal dismissed the suit with costs so far as it applied to Nos. 364 and 362, Ghowspur-Dopahra, and Fatehpur-Lawaech.

The High Court held that the plaintiffs' suit, so far as it applied to No. 364, Ghowspur-Dopahra, and No. 362, Ghowspur-Dopahra, was barred by section 13,

1912

MAHOMED IBRAHIM HOSSAIN KHAN v. AMBIKA PERSHAD SINGH.

explanation II of the Code of Civil Procedure, by reason of the heirs of Musammat Alfan not having set up in the suits of the 3rd of May 1890 and 15th of July 1890, "their title as prior mortgagees on the basis of the *zarpeshgi*, 1874, the ground of relief in the present action." Musammat Alfan's mortgage of the 17th of February 1888 was not prior to the mortgages of the 15th of December 1879, the 30th of December 1880 and the 20th of December 1883, but the plaintiffs, appellants here, claimed priority, as the Rs. 12,000 which Musammat Alfan had lent in 1888 were applied to discharge the debt secured by the *zarpeshgi* deed of 1874. The heirs of Musammat Alfan were persons having an interest in the properties comprised in the mortgages of the 15th of December 1879, the 31st of December 1880 and the 20th of December 1883, and consequently were under section 85 of the Transfer of Property Act, 1882, necessary parties to the suits for sale on those mortgages, and were made defendants to those suits, and not having set up in those suits such rights as they had under the mortgage of the 17th of February 1888 and the *zarpeshgi* deed of 1874, section 13, explanation II of the Code of the Civil Procedure applied, and the claims of the plaintiffs, appellants, as against No. 364, Ghowspur-Dopahra, and No. 362, Ghowspur-Dopahra, and those of the defendants who are alone concerned with those mouzahs are barred. The High Court rightly dismissed the suit with costs so far as it related to No. 364, Ghowspur-Dopahra, and No. 362, Ghowspur-Dopahra.

It remains to be considered whether the plaintiffs had, and could have enforced in this suit, any and what rights against the 5 annas 4 pies share in Fatehpur-Lawaech, and against Gajadhur Mahto and Lalji Mahto, defendants 5 and 6, or either of them. It is not quite obvious on what grounds the High Court

dismissed the suit so far as it related to the 5 annas 4 pies share in Fatehpur-Lawaech, and to the defendants Gajadhur Mahto and Lalji Mahto.

Gajadhur Mahto did not make Musammat Alfan a defendant to the suit for sale which he brought on the 6th of September 1888 on his mortgage of the 7th of January 1888. That suit was brought to obtain a decree for sale of the 5 annas 4 pies share in Fatehpur-Lawaech which had been mortgaged on the 7th of January 1888 to Gajadhur Mahto, and subsequently on the 17th of February 1888 to Musammat Alfan, and had been mortgaged and hypothecated to Girwar Singh by the deed of the 20th of November of 1874 as security for the *zarpeshgi* debt of Rs. 12,000. Under the deed of the 20th November 1874 the Rs. 12,000 was not repayable to Girwar Singh until Jeth 1294 Fasli (September 1887), and consequently the 12 years allowed by article 132 of the second schedule of the Indian Limitation Act, 1877, within which a suit to enforce payment of that debt was allowed, had not expired when Gajadhur Mahto brought his suit. It has been contended that as Musammat Alfan when she lent her Rs. 12,000 to Kishan Kumar Singh in February 1888 to pay off the *zarpeshgi* debt of Rs. 12,000 did not obtain a formal assignment in writing of the *zarpeshgi* deed of the 20th November 1874, and as the *zarpeshgi* debt of Rs. 12,000 was discharged by payment to the representatives of Girwar Singh on the 15th of July 1888, and they quitted possession, Musammat Alfan did not in equity obtain the benefit of the charge which Girwar Singh had under the *zarpeshgi* deed of the 20th of November 1874. It is true that so far as the *zarpeshgi* deed of the 20th of November 1874 operated as a lease of the mortgaged properties, it came to an end on the payment of the *zarpeshgi* debt of Rs. 12,000 to the

1912

MAHOMED IBRAHIM HOSSAIN KHAN v. AMBIKA PERSHAD SINGH.

representatives of Girwar Singh on the 15th July 1888, but their Lordships have found as a fact that the Rs. 12,000 were lent by Musammat Alfan and were borrowed by Kishan Kumar Singh for the express purpose of paying off the *zarpeshgi* debt of Rs. 12,000 which was secured by the deed of the 20th of November 1874; that the Rs. 12,000 lent by Musammat Alfan were in accordance with the agreement between Musammat Alfan and Kishan Kumar Singh applied in paying off the *zarpeshgi* debt, that on payment of that debt the *zarpeshgi* deed of the 20th November 1874 was handed over to Musammat Alfan, and that Musammat Alfan when she lent her Rs. 12,000 intended to keep alive for her benefit and protection the charge which had been created by the *zarpeshgi* deed of the 20th of November 1874. It has been held by this Board, in *Mohesh Lal* v. *Bawan Das* (1), that whether a mortgage paid off is extinguished or kept alive depends upon the intention of the parties. It has also been held by this Board in *Gokuldoss* v. *Rambux Seochand* (2) that the ordinary rule is that a man having a right to act in either of two ways shall be assumed to have acted according to his interests. In the last mentioned case it was held by this Board that the purchaser of an equity of redemption in immovable property situated in India, who, having notice of a second mortgage, paid off a first mortgage upon the property without an assignment of the first mortgage to him, must be assumed, according to the rule of justice, equity and good conscience, to have intended to keep the first mortgage alive, and consequently was entitled to stand in the place of the first mortgagee and to retain possession against the second mortgagee until repayment. In that case this Board was pressed to

(1) (1883) I. L. R. 9. Calc. 961; L. R. 10 I. A. 62.

(2) (1884) L. R. 11 I. A. 126; I. L. R. 10 Calc, 1035.

apply the doctrine of *Toulmin* v. *Steere* (1), but this Board observed that—

> In India the art of conveyancing has been and is of a very simple character. Their Lordships cannot find that a formal transfer of a mortgage is ever made, or an intention to keep it alive ever formally expressed. To apply to such a practice the doctrine of *Toulmin* v. *Steere*(1) seems to them likely, not to promote justice and equity, but to lead to confusion, to multiplication of documents, to useless technicalities, to expense, and to litigation.

And their Lordships in that case held that the obvious question to ask in the interests of justice, equity, and good conscience, is, what was the intention of the party paying off the charge? What this Board said in 1884 as to the art of conveyancing in India and the practice in such cases, is true as to the art of conveyancing and the practice in such cases at the present day. The law on these points applied in the judgments of this Board in *Mohesh Lal* v. *Bawan Das* (2) and *Gokuldoss* v. *Rambux Seochand* (3) was subsequently applied by this Board in *Dinobundhu Shaw Chowdhry* v. *Jogmaya Dasi* (4). Applying the rule of justice, equity and good conscience, their Lordships in this appeal hold that the charge created by the *zarpeshgi* deed of the 20th of November 1874 was kept alive for the benefit of Musammat Alfan. Nothing to bar a claim in respect of that charge, so far as the 5 annas 4 pies share in Fatehpur-Lawaech was concerned, had occurred when Gajadhur Mahto brought his suit on the 6th of September 1888.

As their Lordships have said, Gajadhur Mahto did not make Musammat Alfan a defendant to his suit of the 6th of September 1888. Under section 85 of the Transfer of Property Act, 1882, Musammat Alfan was a necessary party to that suit. It is not alleged that

(1) (1817) 3 Mer. 210.
(2) (1883) I. L. R. 9 Calc. 961 ; L. R. 10 I. A. 62.
(3) (1884) L. R. 11 I. A. 126 ; I. L. R. 10 Calc. 1035.
(4) (1901) I. L. R. 29 Calc. 154 ; L. R. 29 I. A. 9.

1912

MAHOMED IBRAHIM HOSSAIN KHAN v. AMBIKA PERSHAD SINGH.

Gajadhur Mahto when he brought his suit had not notice that Musammat Alfan was a person having an interest in the property comprised in the mortgage upon which he was suing. If Gajadhur Mahto had taken the ordinary precaution of inspecting the register of the district in which Fatehpur-Lawaech is situate, before he took his mortgage of the 7th of January 1888, he would have found that the 5 annas 4 pies share in Fatehpur-Lawaech had been charged by the *zarpeshgi* deed of the 20th of November 1874. It is to be presumed that Gajadhur Mahto took the ordinary precautions before parting with his money, which a prudent intending mortgagee would take. If Gajadhur Mahto had before bringing his suit of the 6th September 1888, and in order to ascertain who would be under section 85 of the Transfer of Property Act, 1882, the necessary parties to his suit, taken the ordinary precaution of searching that register, he would also have found that the 5 annas 4 pies share in Fatehpur-Lawaech was included in Musammat Alfan's mortgage of the 17th February 1888. It has been contended that section 85 of the Transfer of Property Act, 1882, did not apply to the suit which Gajadhur Mahto brought, the contention being that that section does not apply to a suit for sale of an equity of redemption, and that a puisne mortgagee is not a person "having an interest in the property comprised in a mortgage" of a first or any prior mortgagee who brings a suit for sale on his prior mortgage. That contention, if correct, would, as it appears to their Lordships, lead to the conclusion that neither a prior nor a subsequent mortgagee need be made a defendant to a suit for sale by a mortgagee of the specific lands included in his mortgage. The fact is that in suits for sale in India to which other mortgagees are not made parties, what a puisne mortgagee

seeks to sell by means of a decree for sale, is not the equity of redemption so described, but the actual property, lands or houses, mortgaged. It is not obvious why a puisne mortgagee who desires to sell a mere equity of redemption, and not the actual property, lands or houses, described in his mortgage as the property mortgaged to him, should not dispose of his interests by private contract by an assignment of his mortgage to a purchaser, instead of by bringing a suit for sale of the property, land or houses, mortgaged, unless he hopes by concealing what his real interests are to obtain a larger price from an unwary purchaser at an auction sale under a decree for sale, than he could otherwise expect to obtain.

Gajadhur Mahto, in his suit for sale, sought for and obtained a decree for sale of the specific 5 annas 4 pies share in mouzah Fatehpur-Lawaech which had been mortgaged by the *zarpeshgi* deed of the 20th of November 1874, and Musammat Alfan's mortgage of the 17th of February 1888, and under his decree for sale that 5 annas 4 pies share was sold, and it was sold free of all charges and incumbrances so far as the decree or any documents relating to the decree would show. Had section 85 of the Transfer of Property Act, 1882, been complied with by making Musammat Alfan a party to the suit, the decree for sale in Gajadhur Mahto's suit would have dealt with the rights and claims of Musammat Alfan in relation to the charge under the *zarpeshgi* deed of the 20th of November 1874, and her mortgage of the 17th of February 1888, if put forward by her in the suit, and Gajadhur Mahto would have been allowed to redeem the charge of 1874 by payment of Rs. 12,000, and Musammat Alfan would in her turn have been allowed to redeem Gajadhur Mahto's mortgage. If Musammat Alfan had been made a defendant to

1912

MAHOMED IBRAHIM HOSSAIN KHAN v. AMBIKA PERSHAD SINGH.

Gajadhur Mahto's suit and had neglected to put forward her claims, those claims would have been barred under section 13 of the Code of Civil Procedure. In either event all intending purchasers at a sale under the decree would have known what rights were to be sold, and in either event the necessity for the bringing of this present suit, so far as the 5 annas 4 pies share in Fatehpur-Lawaech is concerned, would not have arisen.

As Musammat Alfan was not made a defendant to Gajadhur Mahto's suit, her rights were not affected by the decree in that suit, and section 13 of the Code of Civil Procedure did not bar this suit of the plaintiffs so far as the 5 annas 4 pies share in Fatehpur-Lawaech, and the defendants, Gajadhur Mahto and Lalji Mahto, were concerned. But as the Rs. 12,000 were under the *zarpeshgi* deed of the 20th of November 1874, repayable in Jeth 1294 Fasli (September 1887), and this suit was not brought until the 22nd of September 1900, the claim of the plaintiffs to priority is barred by article 132 of the second schedule of the Indian Limitation Act, 1877, and all that they are entitled to, so far as the 5 annas 4 pies share in Fatehpur-Lawaech is concerned, is a decree entitling them to redeem the mortgage of the 7th of January 1888 on payment to the legal representatives of Lalji Mahto of the amount of the principal and interest in respect of which the 5 annas 4 pies share in Fatehpur-Lawaech was sold to him under the decree for sale in Gajadhur Mahto's suit of the 6th of September 1888.

Their Lordships will humbly advise His Majesty that the decree of the High Court, so far as it operated as a dismissal of the plaintiffs' suit for sale of the 5 annas and 4 pies share in Fatehpur-Lawaech, and dismissed with costs in the High Court and in the Court of the Subordinate Judge the plaintiffs' suit as

against Gajadhur Mahto and Lalji Mahto, should be varied by decreeing that the plaintiffs, appellants here, by payment to the legal representatives of Lalji Mahto, or into the High Court to their credit, within 90 days from the filing of His Majesty's order in the High Court, of the amount of principal and interest in respect of which the 5 annas 4 pies share in Fatehpur-Lawaech was sold to Lalji Mahto under the decree of Gajadhur Mahto in the suit of the 6th of September 1888, may redeem the mortgage of the 7th of January 1888, and may bring the 5 annas 4 pies share to sale for the balance then remaining due of the amount of principal and interest decreed by the Subordinate Judge in this suit; by decreeing that the plaintiffs shall have their proportionate costs of the suit in the Court of the Subordinate Judge and the appeal to the High Court in respect of their claim against the 5 annas 4 pies share in Fatehpur-Lawaech and the defendants, Gajadhur Mahto and Lalji Mahto, the amount of such costs to be ascertained by the High Court, and any costs paid by the appellants to Gajadhur Mahto and Lalji Mahto or his legal representatives or any of them shall be repaid to the plaintiffs; and that in all other respects the decree of the High Court be affirmed, but that there shall be no costs of this appeal.

Solicitor for the appellants: *The Solicitor, India Office.*

Solicitors for the respondents: *T. L. Wilson & Co.*

J. V. W.

CRIMINAL REVISION.

Before Mr. Justice Holmwood and Mr. Justice Sharfuddin.

1912

Jan. 18.

AMBICA PRASAD SINGH

v.

GUR SAHAY SINGH.*

Dispute concerning easement—Right of passage of surplus water through an âl—Jurisdiction of Magistrate to direct an opening in the âl to be made by a party, and, on failure, by the Police—Criminal Procedure Code (Act V of 1898), s. 147.

The Magistrate has jurisdiction, under section 147 of the Criminal Procedure Code, on being satisfied that a party has a right to have an opening in an *âl*, for the purpose of draining off the surplus water from his lands, and that he has exercised the right for several years, and also on the last occasion when it was exercisable, to pass an order requiring the opposite party to make the opening within a reasonable time from its date, and on his failure to do so, directing the Police to make the same.

Dowlat Koer v. *Siva Pershad Pandit* (1), *Pasupati Nath Bose* v. *Nando Lal Bose* (2), and *Lalit Chandra Neogi* v. *Tarini Pershad Gupta* (3) followed.

Dalmir Puri v. *Khodadad Khan* (4) distinguished.

In re Lindsay (5) not followed.

THE petitioner and the opposite party were 12 and 4 annas co-sharers, respectively, in the village of Amaton, in the district of Gaya. In June 1910, there was a partition of their lands, and an *âl* running, from north to south, with the lands to the east and west of it, fell to the petitioner, the first party, who alleged

* Criminal Revision, No. 995 of 1911, against the order of A. Samad Deputy Magistrate of Gaya, dated Aug. 8, 1911.

(1) (1911) 10 Ind. Ca. 615.
(2) (1900) 5 C. W. N. 67.
(3) (1901) 5 C. W. N. 335.
(4) (1909) I. L. R. 36 Calc. 923
(5) (1881) I. L. R. 4 Mad. 121.

that they repaired the breaches in the *âl* on the 12th May 1911; the second party laid an information at the thana stating a likelihood of a breach of the peace in consequence of the action of the first party. A proceeding under section 144 of the Criminal Procedure Code was at first drawn up between the parties. The second party in their written statement, filed on the 31st May, admitted that the *âl* belonged to the petitioner, but alleged that there were three openings in it for the discharge of the surplus water from their own lands during the rains, which the petitioner had closed in Baisakh last. Proceedings under section 147 of the Code were ultimately drawn up, in July 1911, by Maulvi A. Samad, a Deputy Magistrate of Gaya, who, after recording evidence, found that there were three openings in the *âl* through which the surplus water from the lands of the second party passed, that the latter had exercised their right of draining off their surplus water in this way for several years and also on the last occasion when the right was exercisable, that is, during the last rains. He, accordingly, passed an order, on the 8th August, requiring the first party to make three openings in the *âl* within five days from its date, and directing, on their failure to do so, the Police to carry out the order by making the openings. The petitioners then moved the High Court, and obtained the present Rule.

Babu Harendra Narain Mittra, *Babu Atulya Charan Bose* and *Babu Lakhi Narain Singh*, for the petitioner.

Babu Manmatha Nath Mukherjee and *Babu Siva Nandan Roy*, for the opposite party.

HOLMWOOD AND SHARFUDDIN JJ. This Rule was apparently issued on some apparent conflict between the rulings in the cases of *Pasupati Nath Bose* v.

1912

AMBICA PRASAD SINGH v. GUR SAHAY SINGH.

Nando Lal Bose (1) and *Lalit Chandra Neogi* v. *Tarini Persad Gupta* (2) with the later decision in the case of *Dalmir Puri* v. *Khodadad Khan* (3). All these cases we may say are in direct conflict with the early Madras Ruling in *In re Lindsay* (4). But that of course does not affect our decision in this Court. We are bound to follow the rulings of the Calcutta Court. Now, it so happens that this apparent conflict has been dealt with by us in a judgment which was passed in *Criminal Revision No. 187 of 1911*, *Dowlat Koer* v. *Siva Pershad Pandit* (5), but which does not appear in any of the various reports, though we are told it is reported in "Indian Cases." We, therefore, hold that the ground upon which the order was set aside in *Dalmir Puri* v. *Khodadad Khan* (3) was quite distinguishable from the previous cases, which held that the Magistrate had power to invoke the assistance of the Police in carrying out the injunction he made under section 147. The injunction in this case is a good one. It appears on the face of the order that the second party having satisfied the Magistrate that he had a right to have an opening in the *âl* in question for the purpose of passing water, he having exercised the right for several years, and also during the last rains when the right was last exercisable, it was clearly the Magistrate's duty to direct the first party to make three openings in the said *âl* within a reasonable time from the passing of the order. The time given was five days.

Then comes the question, if he failed to carry out the Court's order, what was to be done. The Court held, following our judgment in *Dowlat Koer* v. *Siva Pershad Pandit* (5), and the cases we have cited from

(1) (1900) 5 C. W. N. 67.
(2) (1901) 5 C. W. N. 335.
(3) (1909) I. L. R. 36 Calc. 923.
(4) (1881) I. L. R. 4 Mad. 121.
(5) (1911) 10 Ind. Cas. 615.

5 Calcutta Weekly Notes, that the Police might be ordered to see that the obstruction was removed. Of course, there is the alternative that the parties who failed to carry out the injunction should be prosecuted under section 188 of the Penal Code. But we think that that would be a cumbrous course, and it would be much more prejudicial to the second party in a section 145 case than the usual method of obtaining Police assistance. The Rule is, therefore, discharged.

1912

AMBICA PRASAD SINGH v. GUR SAHAY SINGH.

E. H. M. *Rule discharged.*

APPELLATE CIVIL.

Before Mr. Justice Coxe and Mr. Justice Imam.

KALIMUDDIN

v.

MEHARUI.*

1912.

Feb. 12.

Administration bond—Letters of administration—Probate and Administration Act, 1881, ss. 78, 79, 86—Administration bond in favour of District Judge—Assignment of the bond by the District Judge—Second assignment—Appeal—Memorandum of appeal treated as petition for revision.

Under s. 79 of the Probate and Administration Act, 1881, a District Judge has no authority to assign an administration bond again to a person so long as a previous assignment of the said bond to another person is in force.

No appeal lies against an order passed by the District Judge assigning a bond under s. 79 of the Act; but where the District Judge passes an order which he has no authority to do, the High Court may interfere, treating the memorandum of appeal as an application for revision.

Uma Charan Das v. *Muk akeshi Dasi* (1) discussed.

APPEAL by Sheikh Kalimuddin, the opposite party.

* Appeal from order No. 235 of 1911, from the order of S. S. Skinner' District Judge of Purnea, dated Aug. 29, 1910.

(1) (1900) I. L. R. 28 Calc. 149.

1912

KALIMUDDIN v. MEHARUI.

One Sheikh Moulabux died intestate, leaving behind him a widow, a daughter, and three sons, in April 1902. Sheikh Kalimuddin, the opposite party, then took out letters of administration in respect of the estate of his deceased brother, the aforesaid Sheikh Moulabux, and executed an administration bond in favour of the District Judge of Purnea on the 30th July 1903, under s. 78 of the Probate and Administration Act. On the application of Sheikh Gyasuddin, one of the sons of the deceased Moulabux, the District Judge having held an enquiry, assigned the bond in favour of the said Gyasuddin for his benefit and that of the other co-sharers. Subsequently Mussamat Mobaran, the widow, for herself and as guardian of her two minor sons, as also the daughter, made an application to the District Judge, in which they charged the opposite party with gross mismanagement of the estate, and prayed that after making an enquiry, he would direct the administration bond to be assigned to the petitioners under s. 79 of the Act, and also direct the letters of administration to be revoked. The opposite party denied the charge of mismanagement of the estate, and pleaded that the Court had no jurisdiction to assign the administration bond to the petitioners. The District Judge, having overruled the objections of the opposite party, granted the prayer of the petitioners and directed the bond to be assigned to them.

Against this decision, the opposite party appealed to the High Court.

Babu Shib Chandra Palit (*Babu Nanda Lal Banerjee* with him), for the appellant. My client executed the administration bond for the due administration of the estate in favour of the District Judge under s. 78 of the Probate and Administration Act, and then the learned Judge assigned it to another person.

and he having done so, the question is whether he could assign it again to other persons. I submit, that he had no jurisdiction to do so. The bond was originally in his favour, and he could assign then, but having once assigned it in favour of one, he could not recall it and assign it again to another person. Section 79 of the Act does not contemplate any such jurisdiction.

Babu Mahendra Nath Roy (with him *Maulvi Nuruddin Ahmed*), for the respondent. Under section 78 of the Probate and Administration Act, the bond enures for the benefit of the District Judge for the time being, that is to say, he would be entitled to sue upon it. Under s. 79 of the Act, the person in whose favour the bond is assigned is enabled to sue upon that bond. The result of the argument of the appellant would be that if the person, to whom assignment was made, in collusion with the administrator, neglected to sue upon the bond, then the Court would have no control over the administrator. This could not have been the intention of the Legislature. The effect of this assignment is to enable the assignee to sue on behalf of the Judge.

No appeal lies against an order under s. 79 of the Probate and Administration Act: see *Broja Nath Pal* v. *Dasmony Dasee* (1).

Babu Shib Chandra Palit, in reply: Under section 86 of the Probate and Administration Act, every order passed under the Act is appealable: see *Uma Charan Das* v. *Muktakeshi Dasi* (2). If there be no appeal then the order passed by the learned Judge being without jurisdiction, could be set aside on revision.

Cur. adv. vult.

(1) (1878) 2 C. L. R. 589.

(2) (1900) I. L. R. 28 Calc. 149.

1912

KALIMUDDIN v. MEHARUI.

COXE AND IMAM JJ. The appellant in this case was granted letters of administration to the estate of one Moulabux, and executed a bond in favour of the District Judge under section 78 of the Probate and Administration Act, 1881, for the due administration of the estate. As apparently he did not administer it properly, the bond was assigned under section 79 of the Act to Gyasuddin, a son of Moulabux. Gyasuddin, however, came to terms with the appellant and did not sue on the bond. The widow and the other children of Moulabux then sought to have the bond assigned to them. This has been granted by the District Judge, and hence this appeal.

A preliminary objection is taken that no appeal lies. We think this contention must prevail. Section 86 of the Act enacts that every order of a District Judge under the Act shall be subject to appeal to the High Court under the rules contained in the Code of Civil Procedure, applicable to appeals. One of those rules is to be found in section 105 of the Code, which lays down that save as otherwise expressly provided no appeal shall lie from any order. There is certainly no express provision in the Code for an appeal from an order assigning a bond. This seems to be in accordance with the view taken in *Broja Nath Pal* v. *Dasmony Dasee* (1) and *Abhiram Dass* v. *Gopal Dass* (2) That view was not taken in *Uma Charan Das* v. *Muktakeshi Dasi* (3), but in that case the effect of the words "Under the rules contained in the Code of Civil Procedure" seems not to have been considered.

We think, however, that the order of the learned District Judge is without jurisdiction, and that we can accordingly revise it. Under section 78 the bond enured for the benefit of the District Judge. Under

(1) (1878) 2 C. L. R. 589. (2) (1889) I. L. R. 17 Calc. 48.
(3) (1900) I. L. R. 28 Calc. 149.

section 79 he could assign it on conditions. But there is no provision in the law which authorised him to assign it again while the first assignment was still in force. If there had been a condition that the assignment should be void, if the assignee failed to comply with certain requirements, in that case a re-assignment might perhaps have been possible. But there is no such condition in the present assignment. All that is stipulated is that any money decreed should be deposited in Court, a condition that can hardly be said to have been broken. No doubt the respondents can apply to have the letters revoked, if they can make out a case under section 50 of the Act, and can sue the administrator. They can also hold Gyasuddin responsible as a trustee for them under section 79 for all that he has recovered. But they cannot obtain an assignment of the bond from the District Judge when it is no longer his to assign.

Accordingly the appeal is dismissed, but in the exercise of our revisional jurisdiction we set aside the order of the District Judge assigning the bond to the respondents. They will be at liberty, if so advised, to proceed with the application for revocation of the letters of administration which the District Judge has left undetermined. We make no order as to costs.

S. C. G.

Appeal dismissed.
Order set aside on revision.

APPEAL FROM ORIGINAL CIVIL.

Before Sir Lawrence H. Jenkins, K.C.I.E., Chief Justice, and Mr. Justice Woodroffe.

1912

Feb. 13

ANGULLIA & Co.

v.

SASSOON & Co.*

Contract—Sale of goods—Goods not appropriated—Resale, power of, in contract—Measure of damages.

The plaintiffs contracted to sell 750 tons of sugar at an agreed price for delivery in equal instalments from August to December 1910 under an agreement which contained the following term: "The goods to be at the buyer's risk and peril from the time of landing of the sugar until they be removed from jetty, dock, ghât or godown; and should the buyers fail to take delivery of the sugar, the sellers will have the option of re-selling the same in the open market by private sale or by public auction and hold the buyers responsible for all consequences." The defendants failed to take delivery of 125 tons under the August shipment. The goods remained in bulk and were never ascertained or even appropriated for the purposes of the agreement. After notice to the defendants the plaintiffs purported to dispose of the goods under the power of re-sale provided in the agreement and brought an action for the recovery of damages estimated on the basis of such re-sale:—

Held, that, as the goods had not been ascertained or even appropriated for purposes of the agreement, they did not come within the power of re-sale as framed, and the "re-sale" was inoperative as a method of measuring damages.

Moll Schutte & Co. v. *Luchmi Chand* (1) distinguished.

Semble: A power of re-sale in a contract can be so framed as to operate on goods even before appropriation.

Inasmuch as the claim for damages was based on re-sale in the circumstances of the case, no decree could be made for damages on the basis of the difference between the contract and market rates.

* Appeal from Original Civil, No. 35 of 1911, in Suit No. 1171 of 1910.

(1) (1898) I. L. R. 25 Calc. 505.

1912

ANGULLIA & Co. v. SASSOON & Co.

APPEAL by the defendants, Messrs. M. S. E. Angullia & Co., from the judgment of Harington J.

This appeal arose out of an action brought by sellers against buyers for breach of contract in failing to take delivery.

By a contract made on the 28th February 1910, Messrs. Angullia & Co. purchased from Messrs. E. D. Sassoon & Co. 750 tons of white cane Java sugar, shipments to be made in equal instalments during August, September, October, November and December 1910. The price was Rs. 7-14-9 per bazar maund *ex* jetty or docks or ghât at sellers' option. The contract was by bought and sold notes, the former being signed by one M. C. Misry *per procuration* M. S. E. Augullia & Co. The bought note contained, *inter alia*, the following provisions :—

"Delivery to be taken by the buyers *ex* jetty or docks within three days and from ghât within 24 hours from the date of landing of the goods from the steamer or steamers. The goods to be at the buyers' risk and peril from the time of landing of the sugar until they be removed from jetty, dock, ghât or godown, and should the buyers fail to take delivery of the sugar, the sellers will have the option of re-selling the same in the open market, by private sale or by public auction, and hold the buyers responsible for all consequences. The contract is to be deemed and construed as a separate contract in respect of each shipment of goods, and the rights and liberties of the sellers and buyers shall be the same as though a separate contract had been made out and signed in respect of each shipment.

"3. Delivery, if given and taken from godown, to be completed within one month from date of landing. If delivery be given from jetty, dock or ghât, sugar to be taken on landing from steamer without rebate of interest. The option of buyers to take delivery from sellers' godown to be declared in writing to the sellers on receipt of notice of steamer's arrival in port. The sugar to be examined by the buyer before being warehoused.

"12. Terms—cash before delivery as customary."

On the 14th September 1910, the plaintiff firm gave notice to the defendant firm of the expected

1912

ANGULLIA & Co. v. SASSOON & Co.

arrival per S.S. *Okara* of 150 tons of sugar, being the August shipment under the contract. The steamer arrived on the 15th September with a large quantity of sugar on board, 150 tons of which were intended for the August shipment under the contract. The sugar was landed in bulk on the 18th September, and in terms of the contract delivery had to be taken by the buyers by the 21st September. On the 23rd September the plaintiffs gave notice to the defendants that the 150 tons of sugar *ex* S.S. *Okara* were incurring demurrage and interest and requesting them to take immediate delivery. On the 6th October the defendants took delivery of 25 tons under the contract, but neglected and failed to take delivery of any further portion.

Thereupon the plaintiffs gave notice to the defendants of their intention to dispose of the balance of 125 tons on their account and risk under the power of re-sale which they claimed as reserved to them under the contract.

On the 7th and 8th November the plaintiffs caused advertisements to be published in the *Calcutta Exchange Gazette* announcing the proposed sale of various lots of sugar under various contracts, amongst others, of 125 tons of white Java sugar *ex* S.S. *Okara* marked A. D. under contract No. 630, and on the 8th November, the sale was effected, these 125 tons realising a price less than the contract price by the sum of Rs. 2,341-14-9. At no time up to or even after the sale of the 8th November were these 125 tons of sugar separated from bulk or appropriated by the plaintiffs towards the particular contract.

The vendors claimed the sum of Rs. 2,341-14-9 from the purchasers together with further sums

for interest and charges, aggregating Rs. 2,745-12-6, and, on the claim being resisted, on the 21st December 1910, the vendors brought this action for the sum of Rs. 2,745-12-6 on the basis of loss suffered on the alleged re-sale.

Three pleas were taken in defence—*first*, that inasmuch as the proprietor of the defendant firm was residing outside British India, Order XXX of the Civil Procedure Code did not apply; *secondly*, that Misry had no authority to enter into the contract on behalf of the defendant firm; and, *thirdly*, that the goods had not been ascertained and therefore the plaintiffs had no right of re-sale.

The suit came on for hearing before Harington J., and on the 21st March 1911, his Lordship gave judgment for the plaintiffs. Harington J. held that the Court had jurisdiction to entertain the suit and that Misry had authority to enter into the contract in suit, and the defendants were bound by it. On the third issue, his Lordship held that inasmuch as the goods were unascertained, the power of re-sale under the contract was not exercisable, but his Lordship was of opinion that the plaintiffs were entitled to damages for breach of contract, the measure being the difference between the market-price and the contract-price at the date of breach. On the third issue, his Lordship observed as follows:—

"Now, the third question is one which, to my mind, is rather more difficult. The evidence is that the plaintiffs called upon the defendant to take delivery of 150 tons of sugar from the Port Commissioners' warehouse. At that warehouse, the plaintiffs had a large quantity of sugar in bags, a great deal more than sufficient to satisfy the contract which they had with the defendant. It is admitted that no particular bags were selected for delivery to the defendant, but that the course of business was for the defendant to

1912

ANGULLIA & Co. v. SASSOON & Co.

pay for the sugar he was prepared to take, and on payment to obtain a delivery order. On presentation of the delivery order at the warehouse, sufficient bags to meet the delivery order would be taken out of the bulk lying in the warehouse and then and there delivered to the defendant. It is conceded that in this case no particular bags were selected from the bulk, because the defendant failed to pay for and obtain a delivery order for the balance of 125 tons as he was bound to do. The plaintiffs sold off 125 tons out of the bulk and now claim to charge as against the defendant the difference in the price at which they sold this quantity and the price the defendant contracted to give. On one side, it is contended that the circumstance that no goods had been appropriated to the contract makes no difference, the sale being held under the condition in the contract. On the other side, it is contended that as no bags had ever been tendered or set apart for the purpose of satisfying this particular contract, there is nothing to shew that the bags sold by the plaintiffs were the actual bags that the defendant ought to have taken, and, that being so, the defendant says that the plaintiffs are not entitled to recover the difference between the two sales, but they say the measure of damages is the difference between the market price on the date of the breach and the contract price.

The cases which have been cited during the argument do not bear on the question, because in each case the goods of which the buyer had refused to take delivery had been ascertained. In this particular case they had not been ascertained. If they had been ascertained, or if there had been a tender of a particular parcel of goods to satisfy the contract, no difficulty would have arisen.

On the whole, I have come to the conclusion that the defendant's contention on this point is the correct one. The clause in the contract giving a power of re-sale refers to the goods covered by the contract, and until the particular goods to be delivered in accordance with the contract have been ascertained, there is nothing to which the power of re-sale under the contract can attach. But inasmuch as my view on this point in nowise affects the merits of the case or the plaintiffs' right to recover, assuming that the market has gone against the defendant, I do not think it right to dismiss the action.

The measure of the damages is the difference between the market price and the contract price of the sugar at the date of the breach. The latest date, as disclosed in the correspondence on which the defendants could have delivered, was October 20th. There must, therefore, be a reference to ascertain the market price of the undelivered portion of the 150 tons on October 20th, and the plaintiff will be

entitled to judgment for the difference between that sum and the contract price if the latter sum is the larger of the two.

The plaintiffs will get their costs of action on Scale No. 2."

From this judgment the defendants appealed.

Mr. Knight (*Mr. Pugh* with him), for the appellants. Harington, J. was correct in holding that there was no power of re-sale in the circumstances, but erred in making a decree for damages, to be measured by the difference between the contract price and the market price. The plaintiffs had framed their case on the alleged re-sale and had refused to amend their plaint. No evidence was given of damage on due date. On the question of re-sale, vendors can sell either under the statutory power provided by section 107 of the Contract Act or under an express power in the contract. Now the goods remained in bulk up to the time of re-sale, and there was no appropriation of goods to the contract, and the property in the goods did not pass to the purchasers. It cannot be argued that the property in the goods passed on the partial delivery of the 25 tons, as there was no intention that it should amount to delivery of the whole: *Kemp* v. *Falk*. (1) As the property in the goods had not passed to the buyers, no power of re-sale lay under section 107 of the Contract Act, nor under the power of re-sale provided in the Contract: *Yule & Co.* v. *Mahomed Hossain*. (2) This case has been properly interpreted by Sale J. in *Clive Jute Mills Co.* v. *Ebrahim Arab* (3), and has not been overruled by *Moll Schutte & Co.* v. *Luchmi Chand* (4) as wrongly stated in the head-note of the latter case. The two cases are distinguishable. The power of

(1) (1882) L. R. 7. A. C., 573, 586. (3) (1896) I. L. R. 24 Calc. 177.
(2) (1896) I. L. R. 24 Calc. 124. (4) (1898) I. L. R. 25 Calc. 505.

1912

ANGULLIA & Co. v. SASSOON & Co.

re-sale in the contract, as framed, contemplates certain goods, the subject-matter of the contract, and can have no operation on goods which remained in bulk.

Mr. S. P. Sinha (*Mr. S. R. Das* with him) for the respondents. The plaintiffs properly exercised the power of re-sale provided in the contract, and damages should have been decreed on the basis of the re-sale. The principle of the decision in *Yule & Co.* v. *Mahomed Hossain* (1) was overruled by *Moll Schutte & Co.* v. *Luchmi Chand* (2), where it was held that the power of re-sale provided by the contract was operative whether the property in the goods passed or not. The former case was based on the view that in order to re-sell so as to ascertain the measure of damages, whether under the Contract Act or under a clause in the contract, the goods must be ascertained and the property in them pass, before due date. In the latter case the Full Bench held that whether the property in the goods passed or not, the right of re-sale arose so long as goods under the contract existed at the due date and continued to exist till re-sale. The latter case has been followed in *Baldeo* v. *John Smidt* (3). It is not necessary that these goods should be ascertained; it would be enough if there were *any* goods in bulk, appertaining to the contract, which existed at the time of breach and which existed till re-sale. Why should it be impossible to re-sell an *aliquot* part of a bulk? It is not the sale of a chose in action, but the sale of goods. There was an appropriation by the vendors, although there may have been no assent

(1) (1896) I. L. R. 24 Calc. 124. (2) (1898) I. L. R. 25 Calc. 505.
(3) (1899) I. L. R. 22 All. 55.

by the buyers so as to make the goods ascertained. There was a notional though not a physical separation, but the legal effect was the same. The ordinary measure of damages is the difference between contract and market prices. There is also the method of ascertaining damages by re-sale. An express power of re-sale in a contract would have no legal effect, if it were necessary that the property should pass, before the power became operative, as on the property passing the vendors would have a statutory power of re-sale under section 107 of the Contract Act.

Assuming there was no appropriation, the transaction would amount to an agreement to sell, and on the defendants committing breach, the plaintiffs had the option either to sue for the difference between the contract and market prices or to rescind the agreement and fix the measure of damage by what is termed in the contract a *re-sale*, but what in this view is in fact a method of assessing such damage. In any event, the plaintiffs are entitled in the alternative to a decree for damages based on the difference between contract and market rates. The due date of the contract was postponed, as is apparent from the delivery of 25 tons on the 6th October.

Mr. Knight, in reply.

Cur. adv. vult.

JENKINS C. J. This litigation has been occasioned by the alleged breach of a contract for the sale of sugar. The terms of the contract are set forth in the bought note.

This document is dated the 28th of February 1910, and is signed by M. C. Misry on behalf of the defendant's firm.

1912

ANGULLIA & Co. *v.* SASSOON & Co.

JENKINS C.J.

By it the defendant's firm purports to buy from the plaintiffs 750 tons of white cane Java sugar, the shipments to be made during August, September, October, November, December equally. The price was Rs. 7-14-9 per bazar maund *ex* jetty or docks. Delivery was to be taken by the buyer *ex* jetty or dock within three days, and it was expressly provided as follows:—

"The goods to be at the buyers' risk and peril from the time of landing of the sugar until they be removed from jetty, dock, ghât or godown, and should the buyers fail to take delivery of the sugar, the sellers will have the option of re-selling the same in the open market by private sale or by public auction and hold the buyers responsible for all consequences."

On the 14th September the plaintiffs wrote to the defendant's firm in reference to 150 tons of sugar on board S.S. *Okara*, being the August shipment under the contract, and gave notice of the expected arrival of the steamer on or about that day. The steamer arrived on the 15th, and on the 6th of October delivery was taken of 25 tons under the contract, but beyond this no delivery was taken.

On the 8th of November the plaintiffs sold the balance of 125 tons, and it is their case that this was done in exercise of the power of re-sale vested in them by the contract. On this footing they demanded from the defendant's firm a sum of Rs. 2,341-14-9 as representing the difference between the contract price and the amount realized on the re-sale, and further sums for interest and charges, which brought the whole of their demand up to Rs. 2,745-12-6.

The claim was resisted by the defendant's firm, and so this suit was brought.

The case came for trial before Harington J., and the three following issues were raised: (i) whether

the suit lies under Order XXX, (ii) whether the manager, Misry, had authority, and (iii) whether there could be no re-sale of unascertained goods. The learned Judge decided the first and second issues in the plaintiff's favour, and the third against them. He, however, directed an enquiry as to damages.

From this decree the defendant firm has appealed. The objection of want of jurisdiction embodied in the first issue has been abandoned and the points made before us are these:—

First, it is said that the contract was unauthorized, and, *secondly*, that as the Judge decided against the plaintiff's contention that the price on the re-sale furnished the measure of damages, he should have dismissed the suit and not directed a reference.

For the defendant it has been contended that the Judge was in error in deciding adversely to his contention as to the re-sale, and though no cross-appeal or cross-objections have been filed, it is urged that Order XLI, rule 33, empowers the Court to give effect to defendant's contention as to the re-sale.

First, I will deal with the defendant's contention that the contract was unauthorized.

I do not propose to deal with this at length, for I am in complete agreement with Harington J. on this point.

True it is that the contract was signed not by the defendant but by Misry, his agent; but Misry was acting under a power-of-attorney which authorized him to direct, to superintend, manage and control and carry on in Calcutta in the name of M. S. E. Angullia & Co. the business of general merchants and then carried on by the defendant

1912

ANGULLIA & Co v. SASSOON & Co.

JENKINS C.J.

in Singapore and elsewhere. For that purpose the widest powers were vested in Misry, followed no doubt by the qualification that nothing therein contained should be deemed to authorize the "attorney to speculate in gunnies, opium, shares or exchange."

It is urged that the transaction in suit was a speculation and so in contravention of the power-of-attorney. But even if it was a speculation—and this is a view that has not been established—it is outside the terms of the express prohibition on speculation. But then it is said the transaction is not in accord with the manner in which business was carried on by the defendant at Singapore, and in this connection the defendant complains that a commission for his examination should have been issued, as this would have enabled him to prove this point.

In my opinion there is no force in this contention, and I am confirmed in this view by the fact that at the hearing the request for a commission was not advanced.

And I think there was very good reason for this. The words "as now carried on by me in Singapore and elsewhere" are merely descriptive of the general character of the business, and were not intended to limit the articles in which business was to be done or to define the terms on which it was to be conducted.

It is not suggested that the agent could not purchase sugar, or that a forward contract could not be made: the objection when analysed is as to the prudence of the transaction, and its mere imprudence would not render it unauthorized.

Then it is contended that as the plaintiffs' claim to damages as formulated in the plaint and

the issues rest on the re-sale, the Court should not have directed a reference as to damages on a totally different basis. I think this contention is entitled to great weight, and all the more in view of the fact that the plaintiffs, when challenged by the defendant, refused to amend their plaint so as to make a case of damages on the difference between the contract price and the market price at due date, and was supported in this refusal by the Court.

And there is yet another circumstance which lends strength to the defendant's contention. The due date under the contract is the 21st September, and there is no evidence of damage on that date: on the contrary, the evidence, such as it is, points the other way. To evade this difficulty it is suggested that the due date was postponed, and, in fact, the learned Judge treats the 20th October as the day of breach.

But postponement was not pleaded, nor was it made the subject of an issue. Nor does the matter rest there; for Mr. Sinha, when challenged. could not point to any agreement, or clear indication, that the due date should be postponed; all he could contend was that it might be inferred from the fact that late delivery was taken of 25 tons.

In my opinion it would be wrong in view of the case made by pleadings and issues, and of the mode in which the plaintiffs' case was conducted, to hold that there was a postponement of the due date or to direct a reference as to damages.

But then the plaintiffs claim that they were entitled to have the damages estimated on the footing of the re-sale. Harington J. decided this against the plaintiffs, holding there was nothing to which the power of re-sale under the contract

1912.

ANGULLIA & Co. v. SASSOON & Co.

JENKINS C.J.

could attach. For the plaintiffs it was contended that the learned Judge in so deciding failed to follow the decision of the Full Bench in *Moll Schutte & Co.* v. *Luchmi Chand* (1).

But when the essential facts of that case and the present are contrasted, they present a significant difference.

In *Moll Schutte & Co.* v. *Luchmi Chand* (1), the plaintiffs sold to the defendants under an indent contract ten cases of tobacco to be shipped by steamer to Calcutta. The plaintiffs ordered ten cases *only* of tobacco, and caused them to be shipped and consigned to themselves for the purpose of fulfilling this contract. The goods duly arrived, but the defendants refused to pay for and take delivery of the goods on the ground that they were not the goods contracted for. The goods were tendered to the defendants, and were in accordance with the contract. Now to use the phraseology of the Contract Act, the goods had been appropriated, but possibly not ascertained. I say "possibly not ascertained," because it seems to have been thought by the Full Bench that the property in the goods had not passed (*see* section 83). The position then was that the vendors had done all in their power to make the specific goods the subject-matter of the contract.

In this case it is otherwise; here there was neither ascertainment nor even appropriation. The sugar was in bulk, and the vendors had not even appropriated the goods for the purposes of the agreement, and that condition of affairs continued until after the re-sale.

Can it be then said that there even were goods to which the power of re-sale applied so as to make the result of that re-sale the measure of damages?

(1) (1898) I. L. R. 25 Calc. 505.

The answer to this depends on the construction of the agreement between the parties as did the decision in *Moll Schutte & Co.* v. *Luchmi Chand* (1) turn on the construction of the agreement there under consideration.

Neither in that case nor in this was any general principle or rule of law involved. What then is the scope of this power of re-sale the words of which I have already read? The goods would have come within its operation if they had been ascertained, or even if they had been appropriated for the purpose of the agreement. But in my opinion it would be going beyond the true meaning of the words to extend the operation of the clause to goods which had not even been appropriated, and thus had in no sense become the subject-matter of the contract.

I do not say that a clause could not have been so framed as to have this extended operation: there would be nothing illegal in it. But I do hold that the clause, as it has actually been framed, cannot have this operation.

This is the view taken by Harington J., and he, too, arrived at this conclusion by the same process of reasoning. I think he used the word "ascertained" not in the technical sense in which it is employed in the Contract Act, but in the sense of "appropriated," for I feel very sure the learned Judge had no intention of disregarding the Full Bench decision.

The result then is that, while I agree with the view of the learned Judge as to the scope of Misry's authority and the interpretation of the power of re-sale, I think, for reasons I have already stated, that a reference as to damages should not

(1) (1898) I. L. R. 25 Calc. 505.

1912

ANGULLIA & Co. v. SASSOON & Co.

have been granted as this was opposed to the plaintiffs' own case.

The appeal must therefore be allowed and the suit dismissed with costs throughout.

WOODROFFE J. I agree.

Appeal allowed.

Attorneys for the appellants: *Pugh & Co.*
Attorney for the respondents: *N. C. Bose.*

J. C.

APPEAL FROM ORIGINAL CIVIL.

Before Sir Lawrence H. Jenkins, K.C.I.E., Chief Justice, and Mr. Justice Woodroffe.

1912

Feb. 14

RANJIT LAL KARMAKAR

v.

BIJOY KRISHNA KARMAKAR.*

Hindu law Adoption - Anumatipatra, construction of - Simultaneous or successive adoption—Preferential right of adoption of senior widow.

Where a Hindu, governed by the Bengal school of Hindu law, had previous to his death executed an *anumatipatra* in these terms: "This *anumatipatra* for taking adopted son is executed to the following effect . . . in favour of first wife B. S. and second wife S. B. . . I am giving permission in writing that when I shall be no more each of my two wives shall be at liberty to adopt three sons successively, that is, one after another, and shall lead a mora life. It is also permitted that each of my wives shalll live in my ancestral dwelling house with her adopted son . . . ":—

Held, that applying the canon of construction laid down in *Akhoy Chunder Bagchi* v. *Kalapahar Haji* (1), the document did not contemplate simultaneous adoption by the widows, but successive adoption in accordance with the rule of law.

* Appeal from Original Civil, No. 41 of 1911, in suit No. 1009 of 1909.

(1) (1885) I. L. R., 12 Calc. 406 ; L. R. 12 I. A. 198, 202.

As between co-widows, the senior, that is to say, she, whose marriage was earlier, has in general a preferential right of adoption.

Decision of Stephen J. (1) affirmed.

APPEAL by the defendant, Ranjit Lal Karmakar from the judgment of Stephen J. (1).

One Shib Krishna Karmakar, a Hindu governed by the Bengal school of Hindu Law, died on the 29th November 1903, leaving two widows, Biraja Sundari Dassee, the senior, and Shashibala Dassee the junior widow, and no son. The day before his death he executed an *anumatipatra* or authority to adopt in favour of his two widows The authority was in these terms: "This *anumati patra* for taking adopted son is executed to the following effect by Sri Shib Krishna Karmakar father's name the late Ram Kristo Karmakar, by caste Karmakar, by occupation gold and silver-smith, inhabitant of Sabhar, thana Sabhar, district Dacca, in favour of first wife Sreemutty Biraja Sundari Dassee and second wife Sreemutty Shashibala Dassee. I am now ailing, having been attacked with cholera. There is no knowing when what may happen to the transient body I have got no son born of my loin, and, although in the hope of perpetuating the generation, I have married two wives successively, but up till now no son is born. Consequently by this *anumatipatra* I am giving permission in writing that when I shall be no more, each of my two wives shall be at liberty to adopt three sons successively, that is, one after another, and shall lead a moral life. It is also permitted that each of my wives shall live in my ancestral dwelling house with her adopted son. On the other hand, if she goes to live in another place with her

(1) (1911) I. L. R. 38 Calc. 694.

1912

RANJIT LAL KARMAKAR v. BIJOY KRISHNA KARMAKAR.

adopted son she shall not have any right to the moveable and the immoveable properties to be left behind by me."

On the 13th April 1905, the junior widow purported to adopt Ranjit Lal Karmakar without seeking the senior widow's consent, and on the 9th March 1908 the senior widow purported to adopt Bijoy Krishna Karmakar.

On the 14th September 1909, Bijoy Krishna Karmakar, through his mother as next friend, brought this suit for a declaration that the alleged adoption of Ranjit Lal Karmakar was void and inoperative in law and for a declaration that he himself had been validly adopted as a son to the deceased. The suit was heard before Stephen J., and on the 17th May 1911 his Lordship pronounced a decree in the plaintiff's favour (1).

From this judgment the defendant, Ranjit Lal Karmakar, appealed.

Mr. H. D. Bose (*Mr. I. B. Sen* with him), for the appellant. The *anumatipatra* is inoperative, as it creates a power of simultaneous adoption in favour of both the widows: the existence of two adopted sons at one and the same time is contemplated: *Surendro Keshub Roy* v. *Doorgasoondory Dassee* (2). If, however, the authority to adopt is held to be good in law, the adoption of Ranjit Lal has a preferential claim as it was chronologically first. The doctrine laid down by the Bombay Court in *Rakhambai* v. *Radhabai* (3), and *Padajirav* v. *Ramrav* (4), that the senior Hindu widow has a preferential right to adopt, has no application in Bengal. In the Presidency of Bombay the senior widow has a preferential right, if not an exclusive right, to adopt, so long

(1) (1911) I. L. R. 38 Calc. 694.
(2) (1892) I. L. R. 19 Calc. 513.
(3) (1868) 5 Bom. H. C. (App.) 181.
(4) (1888) I. L. R. 13 Bom. 160.

as she is not leading an irregular life. In Bengal, where an express authority by the husband to adopt is necessary, this right has never been recognised. The question did not directly arise in *Mondakini Dasi* v. *Adinath Dey*. (1)

Mr. B. C. Mitter (*Mr. Sircar* with him), for the respondent, was not called upon.

JENKINS C.J. The plaintiff, who is the respondent before us, has brought this suit against the defendant to have it declared that the alleged adoption of the defendant is void and inoperative in law. The case was heard before Mr. Justice Stephen, who has pronounced a decree in the plaintiff's favour. From that decree the present appeal has been preferred.

The points urged on behalf of the defendant are two—*first*, he says that the document of authority under which the adoption both of the plaintiff and himself purports to have been made is bad; and, *secondly*, that if it is good, then his adoption, and not the plaintiff's, is valid, although made by the younger of the two widows of the deceased.

The facts are briefly these: one Shib Krishna Karmakar, a Hindu governed by the Bengal school of Hindu Law, died on the 29th of November 1903, leaving two widows, Biraja Sundari Dassi and Shashibala Dassi, and no son. The day before his death he executed this authority to adopt in favour of his two widows. The junior widow, Sreemutty Shashibala Dassi, purports to have adopted the defendant on the 13th of April 1905, without even seeking the elder widow's consent. The elder widow purports to have adopted the plaintiff on the

(1) (1890) I. L. R., 18 Calc., 69.

1912

RANJIT LAL KARMAKAR v. BIJOY KRISHNA KARMAKAR.

JENKINS C.J.

9th of March 1908; and it is in these circumstances that the contentions to which I have referred arise. The argument by which the defendant would annihilate his own position by contending that the deed of the power of adoption is inoperative is, in my opinion, one that cannot succeed. The document was executed under circumstances which may account for a certain degree of vagueness and uncertainty in its terms, and we are entitled to apply to it the canon of construction which has been laid down by their Lordships of the Privy Council in *Akhoy Chunder Bagchi* v. *Kalapahar Haji* (1), where it was said in construing a document then before their Lordships, that they would consider that the person giving the authority intended his widows to do that which the law allowed and not to do something which was, if not absolutely illegal, very unusual and not practised amongst Hindus. It appears to me that it is a fair and reasonable interpretation to put on this document to say that it did not contemplate simultaneous adoption by the widows, but successive adoptions in accordance with the rules of law as now established and as established at the time when this document came into existence.

Treating the document as a valid document, was the junior widow entitled to adopt without the consent of the senior widow or without even asking for that consent? Now, it is well established in the Presidency of Bombay that, as between co-widows, it is the senior, that is to say, she, whose marriage was earlier, that has the preferential right to adopt in circumstances like the present. Those decisions rest upon fundamental principles and on views of Hindu life and economy which appears to me to

(1) (1885) I. L. R. 12 Calc. 406; L. R. 12 I. A. 198, 202.

1912

RANJIT LAL KARMAKAR v. BIJOY KRISHNA KARMAKAR.

be fully applicable here. Any other view would merely lead to an unseemly scramble for the purpose of performing this solemn act. In my opinion, the decision of Mr. Justice Stephen is correct, and we must dismiss the appeal with costs. The reserved costs will be costs in the appeal.

WOODROFFE J. I agree.

Appeal dismissed.

Attorney for the appellant: *J. C. Dutt.*

Attorney for the respondent: *D. M. Ghose.*

J. C.

APPEAL FROM ORIGINAL CIVIL.

Before Sir Lawrence H. Jenkins, K.C.I.E., Chief Justice, and Mr. Justice Woodroffe.

1912

Feb. 14.

KHITISH CHANDRA ACHARJYA CHOWDHURY

v.

OSMOND BEEBY.*

Administrator pendente lite—Discharge, order of—Passing of accounts—Suit for account, whether subsequently maintainable—Civil Procedure Code (Act V of 1908), O. XIV, r. 6.

An order discharging an administrator *pendente lite* from further acting as such upon passing his accounts, and the consequent passing of his accounts, in the circumstances of the case, did not constitute a bar to a suit for an account brought against him.

APPEAL by the plaintiffs, Khitish Chandra Acharjya Chowdhury and Sreemutty Sindhubala Debee, from the judgment of Harington J.

This appeal arose out of a suit brought against an administrator *pendente lite* for an account and for the recovery in particular of certain specific sums alleged to have been overcharged or wrongly charged.

* Appeal from Original Civil, No. 39 of 1911.

1912

KHITISH CHANDRA ACHARJYA CHOWDHURY v. OSMOND BEEBY.

The plaintiffs were respectively the infant grandson, suing by his father as next friend and guardian, and the widow of one Dakhina Mohun Roy, a wealthy Hindu landholder, who died on the 6th June 1901. Shortly after his death, two of his brothers, Annoda Mohun Roy and Peary Mohun Roy, put forward an instrument dated the 31st May 1901, which they alleged to be the will of the deceased, and a third brother, Radhika Mohun Roy, put forward a second instrument dated the 2nd May 1901, which he alleged to be the will of the deceased. The widow challenged both these documents as forgeries and entered caveats. Applications for grant of probate of the alleged wills were made by the propounders, and by an order made on the 25th July 1901, the matters were set down as contentious causes, and numbered respectively Nos. 12 and 13 of 1901, in the testamentary and intestate jurisdiction, Annoda Mohun Roy and Peary Mohun Roy being made plaintiffs and Radhika Mohun Roy and the widow defendants in suit No. 12, and Radhika Mohun Roy being made plaintiff and the widow defendant in suit No. 13. By the same order, it was further ordered that the defendant "Osmond Beeby, Barrister-at-law, be appointed the administrator *pendente lite* of the property and credits of the deceased subject to security being given to the satisfaction of the Registrar of this Court and be allowed a commission of two per cent. on the assets that will come into his hands."

The defendant duly furnished security, and on the 17th August 1901 obtained grant of letters of administration *pendente lite* and took possession of the estate.

Suit No. 12 was dismissed on the 21st February 1902, and the subsequent appeal therefrom was similarly dismissed on the 10th March 1903.

On the 21st May 1903, an order was made in the suit No. 13, whereby it was, *inter alia*, ordered that the defendant "do continue to act as administrator *pendente lite* in this suit upon the same terms and conditions as provided in the said order, and it is further ordered that he be allowed to charge commission at 2½ per cent. only on such of the assets of the deceased as shall come into his hands hereafter, and be not allowed any commission on the assets in respect whereof he has already charged a commission under the said order of the 25th July 1901."

The defendant continued so to act as administrator *pendente lite* until the 8th December 1903, on which date an order was made that the defendant "be discharged from further acting as administrator *pendente lite* upon passing his accounts in this Court and that he do forthwith file his accounts in this Court." The order proceeded to appoint another administrator in the place of the defendant.

During the performance of his duties as administrator, the defendant from time to time filed accounts of the estate, that is to say on the 16th December 1902, accounts of the period from July 1901 to June 1902, on the 9th September 1903, accounts of the period from July 1902 to December 1902, and on the 10th December 1903, two several accounts covering the periods January to June 1903, and July to December 1903.

On the 9th January 1904, the accounts of the defendant were finally passed by the Court.

Suit No. 13 of 1901 was dismissed on the 22nd March 1904, and thereupon the widow applied for letters of administration to the estate of her deceased husband. A caveat was entered on behalf of an infant son of Annoda Mohun Roy and letters of administration were claimed on his behalf. The matters were set down as contentious causes, but were subsequently

1912

KHITISH CHANDRA ACHARJYA CHOWDHURY v. OSMOND BEEBY.

compromised, and on the 8th January 1906 an order was made in terms of the settlement arrived at, whereby *inter alia* the administrator *pendente lite* was directed to make over possession of the estate to one Sreemutty Sikharbasini Debee, a daughter of Dakhina Mohun Roy and the mother of the plaintiff Khitish Chandra Acharjya Chowdhury.

Previous to this decree on the 16th August 1905, by a proper deed of relinquishment and release, the estate was relinquished and released to the infant plaintiff, and he thereupon became entitled as full proprietor, and this was confirmed on the 8th September 1906, by a subsequent deed of release and confirmation.

It was alleged by the plaintiffs that the infant plaintiff was in no way bound by the passing of the accounts of the defendant on the 9th January 1904, that the widow, who was a *purdanashin* Hindu lady, did not have her attention drawn to the items charged, that the accounts were passed without any investigation to test their correctness, and that it was only subsequent to the decree of the 8th January 1906 that the defendant's accounts were looked into on behalf of the infant plaintiff, and discovery was made that the defendant had improperly charged various items of commission. Special objection was taken to five particular items aggregating over Rs. 20,000 dated, respectively, the 27th August 1901, the 27th March 1902, the 22nd September 1903 and the 1st February 1904.

This suit was instituted on the 18th December 1907, and it was contended that the plaintiffs were entitled to have the accounts properly examined and checked in their presence, and to be refunded with interest all items overcharged or wrongly charged. No fraud was alleged against the defendant.

It was alleged by the defendant in his defence that the plaintiff widow had full notice through her

attorney of the commission charged including the particular items now objected to and expressly assented to and approved of the same, that she had had the accounts carefully examined on her behalf, and that the accounts had been passed by the Court in the presence and with the consent of her attorney.

It was submitted that inasmuch as the accounts had been duly passed by the Court, the same could not now be reopened or any objection raised to any of the items therein. The defendant further pleaded in particular to the specific items to which objection had been taken by the plaintiffs.

By agreement between the parties, the suit was set down for settlement of issues, for the consideration of the Court, whether the plaint disclosed a cause of action.

On the 18th May 1911, Harington J. dismissed the suit, observing:

"This suit has been set down for trial on a preliminary point, namely in order that it may be determined whether, on the facts which are common ground between the parties, the suit can succeed or whether it must not be dismissed. The claim is that a certain account be investigated and five several sums which were allowed to the defendant in this account be refunded. The defendant was the administrator *pendente lite* in a certain suit under an order which entitled him to a commission on the assets at the rate of 2 per cent. The particular sums claimed in this case appear in the account. The first is under the date 27th August 1901 and the last is in February 1904. The allegation of the plaintiff is that these items are improper charges, and therefore the account ought to be reopened, and these items refunded. Now there is no allegation that the defendant has been guilty of anything of the nature of a fraud or dishonesty. It is part of the plaintiff's case that the items in question appear in the accounts which were filed by the defendant as administrator *pendente lite*, and were in due course allowed and passed by the Court. The complaint which the plaintiff makes as regards the first item is that the commission ought not to have been allowed on the assets, but on the balance left of the assets after satisfying the claims which various Banks had on them. As to the second item the complaint is that commission has been charged on an over-valuation of the deceased's share in the joint

1912

KHITISH CHANDRA ACHARJYA CHOWDHURY v. OSMOND BEEBY.

property. As to third item it is said that the commission charged has been calculated on a higher value than that given in the affidavit of valuation. Then as to the fourth item it is said that the commission has been charged upon the property without a sufficient specification of the property on which the commission is charged being given. And lastly, the fifth ground of complaint is that commission has been charged on the gross collection, and it is said it ought to have been charged on the net collections which would have been considerably less. The position which the defendant as administrator *pendente lite* occupied, with relation to the plaintiff or rather to the person through whom the present plaintiff claims, was that he was bound to render an account of all his dealings with the property during the time he occupied the office to which he was appointed. The plaintiff or rather his predecessor was entitled to call upon him to account. But when the defendant has accounted, it appears to me that he has discharged the duty that lay upon him as long as his accounts are complete and as long as the account is honest and contains neither any false or fraudulent entries or as long as there are no omissions. I confess that when the defendant has accounted in the presence of the parties who are entitled to call on him to account and those parties have had the opportunity of being heard, and when those accounts have, in the presence of those parties, been passed by the Court, I cannot see on what principle the defendant can be called upon to account over again unless there has been fraud, mistake or some omission. The case of *Seagram* v. *Tuck* (1), which was referred in the course of the argument, is distinguishable, because in that case the defendant was called upon to account for a sum which had been omitted from his accounts, and had never been accounted for. In that case the defendant could not answer "I have accounted," because the particular sum in respect of which the suit was brought did not appear in the accounts at all, and he had neglected to do his duty to the plaintiff in that suit by not accounting for it. Here it is conceded that every item of which the plaintiff now complains appears in the account which was rendered by the defendant. No case was cited in the course of the argument as an authority for the proposition that the Court would reopen accounts which have been properly passed in the presence of the parties, in absence of either omission, fraud or mistake, because the party now desires to say that the sums which were allowed by the Court for commission ought to have been calculated on a different principle from that which the Court allowed when the accounts were in due course before it. In my view therefore the present suit will have to be dismissed, because the accounts have been passed by the Court in the presence of the parties, and there is no allegation that the order of the Court in passing

(1) (1881) L. R. 18 Ch. D. 296.

those accounts was obtained by fraud or by the suppression of any material fact. If the parties objected to the principle on which the commission was allowed, they ought to have objected when the accounts were before the Court. For these reasons the suit must be dismissed with costs on the scale No. 2."

From this judgment the plaintiffs appealed.

Mr. B. Chakravarti (*Mr. Lahiri* with him), for the appellants. The fact that the accounts of an administrator have been passed by the Court cannot operate as a bar against the same being reopened in a proper case. From the prevailing practice of placing a large number of accounts at the same time before a judge for passing, it is clear there can be no proper investigation. There is no statutory provision for the investigation of a series of accounts: *Mohesh Chandra Bhuttacharjee* v. *Biswa Nath Bhuttacharjee* (1). The ordering of accounts to be filed under section 98 of the Probate and Administration Act is for the satisfation of the Court and does not take away the rights of a beneficiary under sections 146 and 147 of the same Act. In *Seagram* v. *Tuck* (2), it was held that a Receiver can be called upon to account, although his final accounts have been passed. The same principle would apply to an administrator. The passing of the accounts is not conclusive. If there is an error or omission, the accounts may be re-opened by motion or by an action. The defendant was in a fiduciary position.

Mr. Knight (*Mr. S. K. Mullick* with him), for the respondent. The order of the 8th December 1903 discharging the defendant was a subsisting order, and the suit was not maintainable, until this order was vacated. The order was appealable, but has not been appealed against. The order for discharge amounts to a complete release, and could only be set aside on the

(1) (1897) I. L. R. 25 Calc. 250. (2) (1881) L. R. 18 Ch. D. 296.

1912

KHITISH CHANDRA ACHARJYA CHOWDHURY v. OSMOND BEEBY.

ground of fraud: *Fowler* v. *Wyatt* (1), and *Patch* v. *Ward* (2). An administrator *pendente lite* is not an officer of the Court, nor was there any question of a trust. The suit was really one for money had and received: the money was claimed as of right and paid, and the plaintiffs cannot now obtain a refund: *Brisbane* v. *Dacres* (3). Unless saved by section 14 of the Limitation Act, the whole action was barred. In any event laches and acquiescence would deprive the plaintiffs of any right of suit. The plaintiffs are not without remedy: they can have complete relief by action against their advisers. It could not be contended that there was no opportunity to challenge the accounts before they were finally passed. According to practice the accounts are open to inspection; then on notice the accounts are filed in Court, and an officer of the Court examines them, and finally the accounts are placed before a Judge, in the presence of the parties, and the Court will look into the propriety of accounts. [JENKINS C.J. Would the passing of accounts in the testamentary and intestate jurisdiction be a bar to suit in the ordinary original civil jurisdiction? *Bissell* v. *Axtell* (4).] In *Tichborne* v. *Tichborne* (5) the Court of Probate refused to interfere and stop a sale by an administrator *pendente lite* ordered by the Court of Chancery.

[WOODROFFE J. What is the effect of the minor plaintiff coming in?] He is affected by the previous proceedings to the same extent as his predecessors: *Maund* v. *Allies* (6), *Skyring* v. *Greenwood* (7). There must be a finality to litigation.

(1) (1857) 24 Beav. 232.
(2) (1867) L. R. 3 Ch. App. 203.
3) (1813) 5 Taunt. 143.
(4) (1688) 2 Vern. 47.
(5) (1869) L. R. 2 P. & D. 41.
(6) (1840) 5 Jur. 860.
(7) (1825) 4 B. & C. 281.

Mr. Chakravarti, in reply. The order for discharge releases the administrator from further acting, but does not release him from his liability to account. An administrator *pendente lite* is an officer of the Court.

JENKINS C.J. The suit out of which this appeal arises is one brought against Mr. Osmond Beeby, at one time the administrator *pendente lite* of the estate of one Dakhina Mohan Roy. The purpose of the suit is to recover from him five sums mentioned in the plaint with interest, on the ground that they have been wrongfully retained by him, and it is alleged that the retainer is wrongful inasmuch as it is, according to the plaintiffs, in excess of the remuneration to which he was entitled under the order appointing him administrator *pendente lite*.

The facts on which the plaintiffs base their claim are set out clearly and minutely in the plaint. A written statement has been filed which puts in issue these facts and suggests a complexion of the case that would (it is contended) if established constitute an answer to this claim. Now, it so happens that the defendant, who was practising here as an advocate at the time that he was appointed administrator *pendente lite*, has since retired from India and now lives in England. In view of this fact the attorneys on both sides seem to have come to an agreement—a very proper agreement in view of the circumstances of the case—that the opinion of the Court should be sought, as to whether the plaint was one on which a decree could be passed in favour of the plaintiff, having regard to the circumstances there set out or indicated.

The case was accordingly put down, as it is termed in this Court, for settlement of issues; but there was

1912

KHITISH CHANDRA ACHARJYA CHOWDHURY v. OSMOND BEEBY.

JENKINS C.J.

no such agreement as is contemplated in Order XIV, rule 6, and it is therefore difficult to see how the case, as it came before the Court, could be dealt with otherwise than on the lines that there should be a consideration and determination as to whether the plaint disclosed a cause of action. It was suggested to us by Mr. Knight who pressed the case of his client, the defendant, with some insistence, that there was a wider investigation open to the Court, but I must confess my inability to follow it, because in the absence of such an agreement as is indicated in rule 6, I do not see how the Court can properly deal with a matter of this kind except on the allegations in the plaint. This is the view apparently that commended itself to the very experienced counsel who appeared for Mr. Beeby in the Court of first instance, for I find, from the Court's notes of the proceedings, that Mr. Mitter "on this proceeding raises the issue whether the plaint discloses any cause of action. If that fails the other issues may be tried on the trial of the case on facts." Then Mr. Mitter submitted that the plaint disclosed no cause of action. That I think is the only legitimate matter for our consideration on the present application. The learned Judge, Mr. Justice Harington, decided adversely to the plaintiffs, and it is from that judgment that the present appeal has been preferred.

The position of Mr. Beeby as administrator *pendente lite* is not disputed. It is further the plaintiffs' case that funds came into his hands as administrator *pendente lite*. If that be so, it is clear that he is responsible for the application of those funds. What then is the ground on which it can be said that the plaint discloses no cause of action? It is because the plaint either states or indicates that the accounts of the administrator *pendente lite* were passed by the Court in accordance with the procedure which is

commonly adopted on the original side of this Court, and on the performance of that condition the preceding order discharging him from further acting as administrator *pendente lite* became absolute and operative. The contention, therefore, must be that this passing of the accounts as disclosed by the plaint constitutes a complete bar to the suit. In the view that I take of the case I think it desirable that I should not enter into a general discussion of this case so as to in any way prejudge its merits or the various questions which will arise before it can be finally determinated. I would, therefore, limit myself to saying that the mere fact that the administrator *pendente lite* may have been discharged from further acting as administrator *pendente lite* on passing the accounts in the testamentary jurisdiction, does not, in the circumstances of this case, operate as a discharge so as to constitute a bar to this suit which is brought in the general jurisdiction of the Court. There may be other excellent defences to this suit, but with that we have nothing to do at this stage.

We must, therefore, allow this appeal, set aside the decree of Mr. Justice Harington and remand the case to the Court of first instance for a further rehearing.

We think, in the circumstances, the costs of this appeal and the suit must be costs in the cause.

WOODROFFE J. I agree.

Appeal allowed.

Attorney for the appellants: *H. N. Dutt.*

Attorney for the respondent: *W. J. Simmons.*

J. C.

ORIGINAL CIVIL.

Before Mr. Justice Fletcher.

1912

Feb. 19

IN THE MATTER OF R. C. SEN.*

Municipal Election—List of voters—Calcutta Municipal Act (Beng. III of 1899), Sch. IV, rules 8 and 9—Claims, applications and objections of voters, notice of—Extension of time by Chairman, power of, for giving such notice—Specific Relief Act (I of 1877), s. 45, sub-s. (c)—Mandamus.

Under rules 8 and 9 of Schedule IV of the Calcutta Municipal Act, 1899, written notice of all claims, objections and applications referred to therein must be given to the Chairman on or before the 1st January immediately preceding each general election, and the Chairman has no power to extend the time beyond such date.

Such notices must be lodged with the Chairman or the Election Department, and a lodging of such notices with the Secretary is not a proper lodging as required by the terms of the Act, even though the Secretary resides in the same building as the Corporation has its office, unless it can be shown that the Chairman had authorized the private residence of the Secretary to be used as a place where such notices could be lodged.

The omission of a statutory officer to perform his public duties as to settlement of the election roll in the manner provided by the Act is a forbearance to do something that is not consonant to right and justice within the meaning of section 45 of the Specific Relief Act, 1877; and, therefore, if the Chairman has not performed his statutory duties, the Court will issue an order in the form of a *mandamus*.

MOTION.

This was a rule obtained by the petitioner, Mr. Ramesh Chandra Sen, under section 45 of the Specific Relief Act, 1877, calling upon Mr. S. L. Maddox, Chairman of the Calcutta Corporation, to show cause why he should not prepare and publish a revised list of voters of Ward No. 13 of the Municipal town of Calcutta under Schedule IV of the Calcutta Municipal

* Ordinary Original Civil Jurisdiction (Motion).

Act of 1899 by rejecting the claims, objections and applications filed by I. J. Cohen, Commissioner of the said Ward, on the 2nd January 1912, as if the same had not been filed at all, and by giving effect to those filed by the petitioner.

The facts leading up to the granting of this rule were as follows:—The petitioner, Romesh Chandra Sen, and I. J. Cohen, the sitting Commissioner, were rival candidates for election as Commissioner of Ward No. 13 of the Municipal town of Calcutta. Having obtained papers containing notices of claims, objections and applications from their respective supporters, they, on the 1st January 1912, but at different hours, took them to the Municipal building with the object of lodging them with the Chairman under rules 8 and 9 of Schedule IV of the Calcutta Municipal Act, 1899, which provide that such notices must be given to the Chairman on or before the 1st January immediately preceding each general election. The Chairman, by a notice dated the 23rd December 1911, had extended the time for giving such notices to the 2nd January 1912. On the 1st January 1912, Sen lodged his notices with the Election Department, but Cohen, under the belief that the Election Department was closed, left his papers, numbering about 900, with the Secretary of the Corporation, who resided in the same building. The Election Department was in fact open till 9 P.M. on the 1st January 1912. On the 2nd January 1912, Cohen transferred his notices to the Election Department. Sen objected to any of the notices handed in by Cohen being given effect to by the Chairman in preparing and publishing the revised list of voters, on the ground that they should have been lodged with the Chairman or the Election Department on or before the 1st January 1912, and were therefore out of time. The Deputy Chairman fixed the 23rd January 1912

1912

R. C. SEN, *In re.*

for hearing Sen's objections, and after holding an enquiry and hearing both parties, overruled the said objections. Sen thereupon applied for and obtained this rule, notice of which was served on Cohen as being an interested party.

Mr. B. C. Mitter, for the Chairman of the Calcutta Corporation, did not oppose the rule, and left the matter in the hands of the Court.

Mr. S. R. Das, for I. J. Cohen, submitted that the lodging of the papers with the Secretary on the 1st January 1912 was, under the circumstances, a proper lodging. Even if it was not, the Chairman having extended the date to the 2nd January 1912, the papers were lodged with the Election Department within the time as extended.

Moreover, under section 45 of the Specific Relief Act, 1877, the mere fact that the Chairman had done or forbone from doing an act which is incumbent on him in his public character is not sufficient. It must also be shown under sub-section (*c*) that such doing or forbearing is not consonant to right and justice. This has not been shown here.

Mr. B. Chakravarti, *Mr. H. D. Bose* and *Mr. N. Sircar*, for the petitioner, were not called upon.

FLETCHER J. This is a rule granted under section 45 of the Specific Relief Act, calling upon Mr. S. L. Maddox, Chairman of the Calcutta Corporation, to show cause why he should not prepare and publish a revised list of voters for Ward No. 13 of the Municipal town of Calcutta under Schedule IV of the Calcutta Municipal Act by rejecting the claims, objections and applications filed by Mr. I. J. Cohen, Commissioner of the said Ward No. 13, on the 2nd day of January 1912, and by giving effect to the claims, objections and

applications filed by Mr. Ramesh Chandra Sen, as if the said claims, objections and applications filed by the said Mr. I. J. Cohen were not filed at all, and why he should not pay the costs of and incidental to this application.

Now, the rules for preparation and publication are contained in Schedule IV of the Calcutta Municipal Act, 1899, and by rule 2 of that Schedule it is provided that on or before the 1st day of December 1908, and thereafter on or before the 1st day of December immediately preceding each general election, the Chairman shall prepare from the register of his office a list of persons appearing to be entitled to be enrolled in the Municipal election roll as voters of wards. The list shall contain the names of all persons qualified under any clause or clauses of section 37, and the number of votes to which they are entitled. Rule 3 makes it a condition precedent as being qualified as voters that there should be no arrears of rates and taxes. Then rule 4 provides for the arrangement in alphabetical order of the list of voters, and rule 5 provides for the publication of printed copies of the list for public inspection in a conspicuous position at the Municipal office. Rule 6 provides for delivery of printed copies to persons applying for same on payment of fees as may be prescribed by the Chairman. Then rule 7 provides that on or before the 10th December the Chairman shall give notice by advertising in all the local newspapers of the publication of the list. Rule 8 provides that every person who claims to have his name inserted in the list as being qualified under any of the clauses of section 37 or who claims to be entitled to more votes than are allotted to him in the list, must, on or before the first day of the succeeding month of January, give written notice of his claim to to the Chairman. Any person whose name is in the

1912

R. C. SEN, *In re.*

FLETCHER J.

list may object to any other person as not being entitled to have his name retained therein. Rule 9 provides for representation of companies, associations and joint Hindu families. Rule 10 provides that the Chairman shall before the 1st day of March revise the said list, which he publishes, and he shall for that purpose hear in open office the claims, objections and applications duly made as aforesaid, and shall give three clear days' notice of the holding of the enquiry.

The point in dispute arises in this case is as follows :—The Chairman delegated all his duties to the Deputy Chairman, Mr. Goode. Section 18 provides that the Chairman has the power to delegate his powers. The Deputy Chairman says quite frankly that the office was kept open not only on the 1st January, but also on the 2nd, and he says quite frankly that in settling all the lists of voters he did not consider whether the claims were lodged on the 1st or 2nd January. It is quite obvious to my mind that there is nothing in the Act to suggest that the Chairman can extend the time beyond the 1st January for lodging claims or objections. The facts in the present case appear to be as follows :—It appears that Mr. I. J. Cohen sent certain claims to the Municipal office, but he says that the messenger returned, having been informed, he says, that the Election Department was closed. It makes no difference whether I accept his story that he sent a messenger who found the office closed, or Mr. Sircar's statement. The point is that Mr. I. J. Cohen took these claims on the 1st January not to the Election Department, but to the private residence of the Secretary to the Corporation. Now, the Secretary to the Corporation happens to live in the same building as the Corporation keeps its office. Perhaps the Corporation provides the Secretary with residential accommodation. However that may be,

the place where the papers were lodged by Mr. I. J. Cohen was not the office of the Corporation, but the private residence of the Secretary to the Corporation. The Chairman having appointed a certain place known as the Election Department as the office for taking work with reference to the election of the Corporation, and that office was opened on the 1st January. The order of Mr. Goode, the Deputy Chairman, is as follows:—"It is admitted that Messrs. I. J. Cohen and D. G. Cohen, Commissioners of the Calcutta Corporation, made over a number of applications to Mr. Mookerjee, Secretary to the Corporation, on the evening between 5 and 6 on the 1st January, asking him to receive them as the Election Department was closed. Mr. Mookerjee received the applications and placed them in a box in his office. The box was not locked. Next day about noon Messrs. Cohen came to Mr. Mookerjee, who sent a *chaprasi* with them, taking the applications to the Election Department." The first point is that there is nothing to show that the Secretary to the Corporation is the proper person with whom to lodge the election papers. The person directed by Schedule IV to carry into effect preparations and publications of the Municipal Act is a separate Municipal authority as defined in the Act, namely, the Chairman of the Corporation, and the duties are cast upon the Chairman, and not upon any other authority to carry into effect the provisions of Schedule IV. Moreover, the evidence seems to establish that the Election office remained open on the 1st January till 9 P.M. Then the next point is that the next day, about noon, Messrs. Cohen came to the Secretary and took these papers to the Election Department. It seems to me that on the ordinary reading of the English language the papers were not lodged in the Election

1912

R. C. SEN, *In re.*

FLETCHER J.

Department by the Secretary, but by Mr. Cohen on the 2nd. That being so, it is difficult to see that they were lodged for any other purpose than for safe custody with the Secretary on the night of the 1st January. In my opinion whether they were lodged for safe custody or with a view to be lodged in time on the 1st, the lodging with the Secretary was not a proper lodging as required by the terms of the Act, unless it is shown that the Chairman of the Corporation had authorized the private residence of the Secretary to the Corporation as a place where the claims could be lodged. The Chairman of the Corporation has a private residence of his own. If it were necessary to lodge the papers with the Chairman when the Election office was closed, there was nothing to prevent Mr. Cohen going to the Chairman and lodging the papers with him. I think the more probable story is that these papers were left with the Secretary on the night of the 1st January, and Mr. Cohen came the next day and took them to the Election office, and in fact the papers were lodged in the Election office on the 2nd by this gentleman. Then the only question is, ought this Court to issue an order in the form of *mandamus*. The representation made by the Chairman of the Corporation is that he really does not know if he has performed his statutory duties or not. The Chairman does not oppose the rule being made absolute. Mr. Das raises the point that under section 45 of the Specific Relief Act, proviso *(c)*, it has not been shown that in the opinion of the Court such doing or forbearing is consonant to right and justice. If the omission of a statutory officer to perform his public duties as to the settlement of the election roll in the manner provided by the Act is not forbearing to do something that is not consonant to right and justice, I do not know what is. There can be no

1912

R. C. SEN *In re.*

FLETCHER J

standard of right and justice, except to see whether the public officer has properly performed the duties cast upon him by the statute or not. It seems to me on the representation of the Corporation there is no option but for the Court to make to this rule absolute, and direct the Chairman to act in accordance with the terms of the rule. The point on which the Corporation has asked for a direction is as to whether these papers lodged with Mr. Mookerjee on the 1st were properly lodged. I am of opinion that if the facts are as stated in Mr. Goode's order, then these claims, objections and applications were not properly lodged. They were lodged by Mr. Cohen in the Election office on the 2nd January. I accordingly make the rule absolute.

With regard to costs, the Chairman has acted in good faith. He delegated his duties to a junior officer, who kept the office open on the 2nd and 3rd January. This appears to have been a slip, and I do not, therefore, order the Chairman to pay the costs. As against Mr. Das's client, he came here and fought the rule but has failed. That being so, I think the ordinary rule must apply. I direct Mr. Das's client to pay the applicant's costs of the rule.

Rule absolute.

C. B.

APPELLATE CRIMINAL.

Before Mr. Justice Holmwood and Mr. Justice Sharfuddin.

1912

April

SURESH CHANDRA SANYAL

v.

EMPEROR.*

Sedition—Publication—Handwriting, proof of—Admissibility and value of expert opinion not based on comparison made in Court with admitted or proved handwriting of the person alleged—Penal Code (Act XLV of 1860), s. 124A—Evidence Act (I of 1872), s. 45.

On a charge under s. 124A of the Penal Code the sending of a pamphlet by post, addressed to a private individual not by name, but by designation as the representative of a large body of students, amounts to publication.

It is necessary for the admission of the evidence of a handwriting expert, under s. 45 of the Evidence Act, that the writing with which the comparision is made should be admitted or proved beyond doubt to be that of the person alleged, and that the comparison should be made in open Court in the presence of such person.

Cresswell v. *Jackson* (1), *Cobbet* v. *Kilminster* (2) and *Phoodee Bibee* v. *Gobind Chunder Roy* (3) referred to.

THE appellant was tried by the District Magistrate of Pubna on charges under ss. 124A and $\frac{124A}{109}$ of the Penal Code, and convicted and sentenced, under the former section, to two years' rigorous imprisonment, and acquitted under the latter. The facts were as follows. Babu Khirode Chunder Sen, the Head-master of the Rangpur Zilla School, received through the post at Rangpur, on the 12th September 1910, a manuscript pamphlet of a seditious character entitled *Matripuja* addressed to "The Captain, Zilla School, Rangpur."

* Criminal Appeal No. 1029 of 1911, against the order of J. G. Dunlop, District Magistrate of Pubna, dated Dec. 4, 1911.

(1) (1860) 2 F. & F. 24. (2) (1865) 4 F. & F. 490.

(3) (1874) 22 W. R. 272.

He forwarded both the cover [Ex. 2] and the pamphlet [Ex. 5] to the District Magistrate of Rangpur on the 20th January 1911. The police obtained warrants and searched the houses of the appellant's father and uncle at Bera. In a room occupied by the appellant in the latter's house were found among other documents—

(i) A manuscript copy of another *Matripuja* issue, dated 3rd December 1910 [Ex. 15].

(ii) A private diary [Ex. 16] containing, at p. 73 [Ex. 17], a copy of a portion of Ex. 5.

(iii) A manuscript copy entitled "Association Rules" of a secret society [Ex. 21].

(iv) A manuscript copy of a Swadhin Bharat leaflet—Preparation for a free India—[Ex. 43].

(v) A number of letters, post-cards and money-order receipts.

At the end of March the first four papers were, with the cover and pamphlet, viz., Exs. 2, 5, 15, 17, 21 and 43, submitted to C. Hardless, Junior, who examined them by the aid of photographic enlargements, and expressed an opinion that they were all by the same hand. On the 26th June a complaint was filed, under the order of the Local Government, under s. 124A of the Penal Code, before the District Magistrate of Pubna, by the Superintendent of Police, and a warrant issued. The trial commenced on the 7th August, and the accused was convicted on 4th December 1911.

At the trial Hardless was examined as a witness and stated that in his opinion the exhibits, of which he had made photographic enlargements, disclosed the same characteristics of continued finger and wrist movement, pen presentation, shading, sizing and spacing, and "must have been done, and could only be done, by one hand—one writer." He further said that among the papers he had examined he was given no standard, that he took one writing as a standard for his own

1912

SURESH CHANDRA SANYAL v. EMPEROR.

convenience, viz., the diary, as it was in the most natural hand of the writer. He admitted that he could not read Bengali, and that he did not ask for any admitted signature of the writer. Two Mahomedan boys were also examined who professed to be acquainted with the handwriting of the appellant. Evidence was also given establishing certain entries on the diary, other than Ex. 17, and certain post-cards said to be in the writing of the appellant were put in, but these were not put to Hardless in his evidence. No other evidence of handwriting was given by the prosecution.

Mr. J. N. Roy, for the appellant. I admit the seditious character of the pamphlet, Ex. 5. The only point is, did the accused write or publish it? There is no evidence that he wrote, composed, copied or published Ex. 5, or that he caused it to be posted. The evidence of the two fellow-students is utterly unsatisfactory; they could not be examined under section 164 of the Criminal Procedure Code. The diary bears the name of one Gyanendra Mohan Sanyal on its leaf edge. Mr. Hardless' evidence may be left out, as he had no standard of comparison. Even assuming that the alleged copy is in the handwriting of the accused, publication being the gist of the offence, it does not follow that the accused really posted it.

Mr. Arthur Caspersz, for the Crown. Exs. 2 and 5 are proved to have been sent through the post from Bera to Rangpur. If the accused copied Ex. 5 or wrote Ex 2, he is guilty. Publication may be indirectly proved, throwing the onus on the accused: Folkard, 7th edition, pp. 265-7; Russell on Crimes, 7th edition, Volume I, p. 1033; *Reg.* v. *Lovett* (1) followed in *Surendra Narayan Adhicary* v. *Emperor* (2). Under

(1) (1839) 9 C. & P. 462.

(2) (1911) I. L. R. 39 Calc. 522.

section 73 of the Evidence Act the Court may compare Exs. 2, 5, 15, 17, 21 and 43 with the entries in the diary and the post-cards which are proved to be accused's. Under section 45 Hardless' opinion is relevant to show that Exs. 15, 17, 21 and 43, found in the accused's possession, are written by the same hand as the cover and pamphlet (Exs. 2 and 5). The conduct of the accused is such that the inference is raised that he wrote and was aware of the contents of Exs. 15, 17, 21 and 43, which are equally seditious, found in his exclusive possession; and in fact Ex. 17 is a copy of a portion of Ex. 5: *Barindra Kumar Ghose* v. *Emperor* (1), *Lalit Chandra Chanda Chowdhury* v. *Emperor* (2). Then Ex. 15 is a leaflet similar to Ex. 5 on the same kind of paper, and if Hardless is right, the accused must have copied both. He is also proved to have written Ex. 9 on the 1st October, ordering the *Matripuja* from a firm in Calcutta. A special knowledge and course of behaviour being brought home to the accused, the question is whether a prudent man would not believe that the accused despatched the pamphlet after copying Ex. 5 [section 16 of the Evidence Act, illustration (*a*) and (*b*), section 114, illustration (*f*)] or whether it is merely a case of high probability [section 11, illustration (*b*)]. The evidence of the boys and of Hardless should be accepted. I rely on the concluding sentences of Ex. 5 which show that the writer wished others, whoever might receive it, to make copies secretly and circulate it unknown to the Government. Ex. 43 contains similar instructions.

Cur. adv. vult.

HOLMWOOD AND SHARFUDDIN JJ. This is an appeal from the judgment and sentence passed by the District

(1) (1909) I. L. R. 37 Calc. 467. (2) (1911) I. L. R. 39 Calc. 119.

1912

SURESH CHANDRA SANYAL v. EMPEROR.

Magistrate of Pubna upon the appellant, Suresh Chandra Sanyal, under section 124A of the Indian Penal Code. He has been convicted of forwarding a certain seditious leaflet called *Matripuja* to the Captain of the Rangpur school, and sentenced to two years' rigorous imprisonment.

There is no doubt as to the highly seditious nature of the leaflet, and it is fully admitted by the defence that no question arises on this point.

We also think on full consideration of the facts that the sending of this leaflet by post, addressed not to a private individual by name but to the representative of a large body of students, amounts to publication, and that the intention of the sender was undoubtedly to stir up disaffection to the Government among the students of the Rangpur Zilla School.

But the case entirely fails on the point of proof of handwriting, and we may dispose of it quite shortly on that ground. Two Mahomedan boys, who appear to be on bad terms with the accused, give vague evidences as to their belief that the incriminating documents and others, which were used for purposes of comparison, are in the handwriting of the accused. Their knowledge of his handwriting is largely based on having seen him write on the black-board at school and having overlooked his exercise books. As to this test their evidence is discrepant, and in our opinion worthless; and as regards the writing in chalk on the black-board the expert witness, Mr. C. Hardless, Junior, himself says that such a comparison is in his opinion impossible, as it obviously is.

The expert was given certain writings found in accused's possession to compare, and he has stated that in his opinion all these writings are by one hand. Now, although the writings appear to us to differ very considerably in character, even on the points on which

Mr. Hardless places most reliance, we are quite prepared to receive his evidence with every respect, and might have acted upon it, had any documents that were either proved or admitted to be in the accused's handwriting been placed in his hand. But in this case we are met with the curious anomaly that no such document has been used for purposes of comparison.

Now it is settled law that the one thing that is required for the admission of the evidence of an expert witness as to handwriting is that the writing with which the comparison is made should be proved beyond question of doubt to be that of the person alleged.

The Statute 28 and 29 Vict., c. 18, s. 8, lays down in express terms that the comparison by a witness of the disputed writing, for the purpose of giving an expert opinion, must be with any writing proved to the satisfaction of a Judge to be genuine: see *Cresswell* v. *Jackson* (1) and *Cobbett* v. *Kilminster* (2); and though this condition is not expressly laid down in section 45 of the Evidence Act, which is only a general section as to the admissibility of expert evidence, yet it is clearly indicated in the illustration (*c*) to the section where the comparison is assumed to be made in all cases with a document which is proved or admitted to have been written by the alleged writer of the document in question.

This rule was taken for granted in India in what appears to be the earliest reported case after the passing of the Evidence Act: *Sreemutty Phoodee Bibee* v. *Gobind Chunder Roy* (3), where the Judges (Markby and Romesh Chunder Mitter JJ.) say that under ordinary circumstances they would assume that the comparison took place in open Court, and that a

(1) (1860) 2 F. & F. 24. (2) (1865) 4 F. & F. 490.
(3) (1874) 22 W. R. 272.

1912

SURESH CHANDRA SANYAL v. EMPEROR.

comparison having been made without any objection by the party affected by it, the signature on the *vakalatnama*, which was used for comparison, must have been in fact admitted.

But on a finding that this was not so, the decision of the lower Appellate Court was reversed, and the Judges said that they considered, according to their experience, that a comparison of signature is a mode of ascertaining the truth which ought to be used with very great care and caution.

It is evident that this is doubly so in a criminal case where a large quantity of apparently very different handwriting is under comparison.

The assumption here is that a note-book found in the accused's possession is entirely in his handwriting. Now, there is internal evidence in the book itself that it is not, and the expert was not even asked to say whether all the writing in this book was by the same hand.

Nor was he asked to make any comparison in open Court with proved or admitted handwriting which was then available.

It is claimed by learned counsel for the Crown that the comparison made by the expert months before, when the documents were first discovered and when nobody knew whether they were in the same hand or not, is a strong proof of his impartiality, and should give greater weight to his evidence.

But unfortunately when there is no comparison in open Court before the accused with documents proved or admitted to be in his handwriting, such evidence is inadmissible, and having regard to the minute and scientific investigations which are now in practice made by handwriting experts by means of photographic enlargements and detailed measurements made out of Court, we must emphasize the necessity for

strictly complying with the law as to what has to be done in the Court itself. These preliminary enquiries and scientific researches may be very necessary and very desirable, but they cannot be allowed to supersede or in any way take the place of comparison in open Court with proved or admitted writings which alone renders the expert's testimony admissible. To justify our finding on this point, which is, of course, based on wholly independent legal considerations, we may remark that in this case a very remarkable instance of the danger of relying on inspection made out of Court has come to our notice.

There is an address copied into the accused's note-book at page 73 in which the word "Rungpore" twice occurs. This has been greatly relied upon by the expert for comparison with the same word occurring on the envelope, Ex. 2, in which the incriminating document was sent. Now, not only is this entry wholly unproved, but it appears to us to be an interpolation in the note-book made in a different handwriting to the rest of the page, and the last curve of the "R" is of a wholly different character to that on the envelope, being curved in and rounded instead of outwards, as we have written it above and as it appears on the envelope. On the other hand, the unusually elongated tail of the "g" and the unusually short shaft of the "p" seem to be laboriously imitated in the note-book from the writing on the envelope, and it is obvious that it would be quite possible to put matters before the expert in a private examination which were not in the original document at all, and so deceive him into giving evidence in all good faith upon writing which really had no connection with the case.

We do not say that this is so in this particular case, but the suspicion an entry such as this in the note-book *primâ facie* arouses, illustrates the danger of

1912

SURESH CHANDRA SANYAL v. EMPEROR.

substituting that which is not evidence, namely, the expert's private examination of the documents out of Court, for that which the law has, under the safeguards of extreme care and caution, made admissible as evidence on condition that the examination is made in open Court in the presence of the party affected.

It is clear that on this ground the finding that the accused either wrote, or forwarded by post, the incriminating document falls to the ground. That he was in possession of highly seditious literature and that he habitually sent for, purchased and read such literature is certain, and may give rise to a strong suspicion that he was engaged in disseminating such pernicious writings among his friends and associates. But he is only one of a secret society in the village of Bera which has been deposed to by the District Superintendent of Police, and the publication of this particular missive has not been brought home to him.

Whether he could have been arraigned under section 108 of the Criminal Procedure Code or under section 153A of the Indian Penal Code, it is not for us to enquire. But we have to consider whether or not there should be a re-trial in this case, and we think that, having regard to the fact that the accused has been eight and-a-half months in jail as an under-trial prisoner and as a convict combined, his conduct, even if it could be shown to be criminal, has been amply punished, and we may hope that he will realise the folly and wickedness of tampering with sedition, and, as he is young enough to reform and become a useful member of society, that this will be a sufficient warning to him for the future, there is no need for a re-trial. We set aside the conviction and sentence, and order the acquittal and release of the accused.

E. H. M. *Conviction set aside.*

PRIVY COUNCIL.

BIR BIKRAM DEO

v.

SECRETARY OF STATE FOR INDIA
(AND 14 OTHER APPEALS CONSOLIDATED).

P.C.*
1911

June 27, 28 ;
1912

Jan. 16.

[ON APPEAL FROM THE COURT OF THE JUDICIAL COMMISSIONER OF THE CENTRAL PROVINCES.]

Act of State—Acts done by Government in exercise of its sovereign rights—Status of non-feudatory zamindars in Central Provinces—Withdrawal from non-feudatory zamindars the Police, Excise, and Cattle-pounds administration—Withdrawal of other rights in wajib-ul-arz or administration paper—Police Act (V of 1861)—Excise Act (X of 1871)—Cattle Trespass Acts (III of 1857 and I of 1871)—Central Provinces Land Revenue Act (XVIII of 1881).

The plaintiffs in these appeals were members of a group of non-feudatory zamindars in the Central Provinces whose status was in 1864 determined by the Government to be that of ordinary British subjects. When they first came by conquest or cession under British rule, the management of their estates and the judicial and administrative powers exercised by them were left in their hands as a matter of convenience or economy of administration ; and in no case were they recognised as entitled to independent powers or as possessing any sovereign rights. In 1874, sanads giving them proprietary rights in the soil were granted ; but subsequently at various times the Government withdrew from them the Police and Excise administration, and also the rights they had exercised in respect of cattle pounds ; and in 1903 they were required by the settlement officials to execute (which they did under protest) *wajib-ul-arzes* containing provisions restricting their rights in various ways which they considered prejudicial to their interests and prestige. In suits brought by them against the Secretary of State in which they complained that they had been illegally deprived of rights to which they had been indefeasibly entitled from time immemorial, and that the contents of the *wajib-ul-arzes* were in derogation of their undoubted privileges :

* *Present* : LORD MACNAGHTEN, LORD SHAW, LORD MERSEY AND MR. AMEER ALI.

1912

BIR BIKRAM DEO v. SECRETARY OF STATE FOR INDIA.

Held, that in the exercise of the Police and Excise functions the plaintiffs were acting not as of right, but either by sufferance or by delegation, and that the resumption of those functions by the Government was an act done by the Government in the exercise of its sovereign powers, and consequently the suits were not maintainable in the Civil Courts.

The maintenance of private cattle pounds was incompatible with the provisions of the Cattle Trespass Act; and their establishment under the superintendence and control of Government, as being under the circumstances essential for the maintenance of law and order and the peace and good government of the country, was an act of the Executive Government with which it was not competent for the Civil Court to interfere.

APPEALS and Cross Appeals 42 to 56 (inclusive) of 1910 consolidated, from the judgments and decrees (14th May 1907) of the Court of the Judicial Commissioner of the Central Provinces which partly reversed and varied decrees (6th August 1906) of the Court of the District Judge of Raipur.

In 42, 44, 46, 50, 52 and 55 the various plaintiffs were appellants, and in 43, 45, 47, 48, 49, 51, 53, 54 and 56 the defendant was the appellant, to His Majesty in Council.

The suits out of which these appeals arose were brought by the following Chiefs of various States in the district of Raipur in the Central Provinces, namely, Bir Bikram Deo, Zamindar of Khariar (Appeals 42 and 49 and Cross Appeal 43), Thakur Umrao Singh, Zamindar of Suarmar (Appeal 44 and Cross Appeal 45), Lal Fateh Singh, Zamindar of Dondi Lohara (Appeal 46 and Cross Appeal 47), Manibar Singh, Zamindar of Narra (Appeal 48), Thakur Vishwanath Singh, Zamindar of Fingeshwar (Appeal 50 and Cross Appeal 51), Lal Jagmohun Singh, Zamindar of Sahaspur Lohara (Appeal 52 and Cross Appeal 53), Lal Phul Singh, Zamindar of Parpodi (Appeal 54) and Lal Chattra Shah, Zamindar of Bindra Nawagarh (Appeal 55 and Cross Appeal 56). The suits were instituted by the various Chiefs to obtain declarations

as to (*a*) certain of their rights and privileges which they alleged had been interfered with by a *wajib-ul-arz*, or administration paper, executed by them (under protest) on 6th August 1903 in compliance with the requirements of the Government of India, entries in which they contended were *ultra vires*; and (*b*) the resumption by the Government of India of the administration of the Police, Excise, and cattle pounds within the area of their zemindaries, which resumption they asserted was in derogation of their rights and therefore *ultra vires* and illegal.

The plaintiff, Bir Bikram Deo, the Zamindar of Khariar, brought three separate suits for the relief he claimed, namely, one on 6th May 1904 (No. 6 of 1904) in respect of his objections to the *wajib-ul-arz*, another on 5th August 1904 (No. 27 of 1904) with regard to the resumption of the Police and Excise administration, and the third on 9th May 1905 (No. 31 of 1905) as to the resumption of the cattle pounds. In the suits instituted by each of the other plaintiffs their respective claims under the same three heads were included in one suit; and by agreement between the parties the suits brought by the other zamindars were to be governed by the decisions in suits 6 and 27 of 1904 brought by the Zamindar of Khariar.

The estates of the Zamindars of Khariar were acquired by the East India Company by right of conquest. They were ceded by the Rajah of Nagpur, the then ruling Chief, with sovereign power over those tracts, to the East India Company by the treaty of 1st December 1826: and the same remarks apply to the Zamindar of Bindra Nawargarh (the plaintiff-appellant in Appeal 55; suit 40 of 1904). The estates of all the remaining plaintiffs were in Chattisgarh, another portion of the territories ruled by the Rajah of Nagpur. By the same treaty of 1826 that tract was

1912

BIR BIKRAM DEO v. SECRETARY OF STATE FOR INDIA.

placed under the management of the East India Company on behalf of the Rajah, and was by a treaty of 24th December 1829 restored to him again; but on his death on 11th December 1853 it lapsed, with all his other territories, to the Crown, and became part of British India.

From 1826 to 1861 the affairs of the Sambalpur and Chattisgarh zamindaris were under the administration of the Chota Nagpur Division, the head-quarters of which was at Ranchi. In 1861 the management of these zamindaris was transferred to the Superintendent of the Tributary Mahals, and in 1862 all these territories were placed under the administration of the Chief Commissioner of the Central Provinces. In 1863 the whole subject of the position and status of the Chiefs and Zamindars in Central India was referred to the Chief Commissioner of the Central Provinces (then Mr., afterwards Sir, Richard Temple) by the Government of India to make an inquiry, and report on the matter which he did on 31st October 1863.

In his report he came to the general conclusion

"That though, on the one hand, they are not sovereigns, being in reality quite dependent on Government, having no fixed powers of their own, but exercising more or less of authority, by sufferance or by delegation, and being altogether subject to the pleasure of Government as declared from time to time; yet, on the other hand, they are quite above the rank of ordinary subjects; their governmental, or administrative authority, however undefined, and however liable to interruption, has always existed, and still exists; and such authority ought not to be, and indeed cannot be, done away with. Moreover, it is clear that with certain exceptions, the Government, Native or British, has never maintained any establishment whatever, police, fiscal or other, at its own cost, within these Chiefships. Successive Dynasties and Governments have received tribute or revenue from the Chiefs, and have incurred no charge whatever on account of the Chiefships, beyond the general obligation of military defence, which must always attach to the Paramount Power. Many lakhs of revenue have been received from the Chiefships for generations, and the Chiefs have been left to defray the

charges of the civil administration, and of the preservation of the peace. With certain exceptions, no charge is incurred at this day, so that the tribute or revenue is *ne* gain, free from all charge on account of cost of collection, or anything else. And thus tracts and districts, which have a vast area, and often a wild population, and which would be very troublesome and expensive if managed by British establishments, and which, if so managed, would probably not pay their own expenses, are really managed through the aid of these Chiefs, without any British establishment, and yield a *net* profit in the shape of tribute, to a British Treasury. This indicates unmistakably that to these Chiefs there has been delegated a portion of the duties and responsibilities of Government, while they have been permitted to enjoy a considerable share of the public revenue . . . . . But in respect of their present situation it appears to be as follows :—Here are a number of Chiefs, passing under different denominations, in different parts of the country, who, in their origin, which is lost in the remote past, may have been independent, or only nominal feudatories of one or other of the great powers of the time ; who, in later times, were made feudatory and tributary, by the Paramount Power, within whose reach they dwelt ; yet who, while thus tributary, were not held entitled to permanent engagements for the maintenance of their status on any definite basis ; and who, under British rule, though treated leniently in respect of tribute, or revenue demands, are, *first*, still uncertain as to the principle in which future settlements with them are to be made ; and, *secondly*, having been shorn of much of their judicial and executive power within their Chieftainships, have yet (the investiture of some of them as Magistrates * excepted) never received any distinct recognition at the hands of Government, in regard to the powers and authority of which they remain virtually possessed, and which they actually exercise though in a casual, informal and precarious manner. It is never precisely understood how far they are ordinary subjects, destitute of authority, or how far they are more than ordinary subjects possessing authority. And the practical result is that because our system of management, owing to the indication of only a 'general line of policy,' has been wanting in definiteness and consistency the status of the Chiefs has remained surrounded with considerable, uncertainty."

By order of the Government of India, dated the 6th December 1864, it was decided, after full consideration of the above reports, that the Chiefs should be divided into two classes : (*a*) Chiefs ranking as feudatories, and

* Under the Criminal Procedure Code (Act XXV of 1861).

1912

BIR BIKRAM DEO v. SECRETARY OF STATE FOR INDIA.

(*b*) Chiefs ranking merely as ordinary British subjects; and by a letter to the Chief Commissioner, dated 3rd April 1865, the Government of India determined that the plaintiffs in the present appeals fell within the latter class.

In 1867 a question arose as to the form and provisions of the patent of proprietary right and the administration paper required to be drawn up for use in the case of the Zamindars of Chanda in the Central Provinces, who were non-feudatory Chiefs on the same footing as the present plaintiffs; and a scheme of conditions was drawn up based upon the usages actually existing from ancient times, a draft of the document (afterwards known as the Chanda Patent) embodying these conditions being sanctioned by the Government of India, who directed that it should be taken as a "general model" for the arrangements applicable to the non-feudatory zamindars of Chattisgarh, and it was intended that the arrangements in question should be embodied in the *wajib-ul-arz* or administration paper, which in the usual course was required by the Government to be executed by the zamindar when the settlement of his tenure for a term was being made. But owing to an oversight at the time of the settlement for 20 years made with the plaintiffs and other non-feudatory zamindars in 1869, the execution of a *wajib-ul-arz* at that settlement was overlooked.

On 25th November 1874, sanads recognising the proprietary rights and ownership of the Zamindar of Khariar and of the other plaintiffs in their zamindaris were granted to them by the Government, the grant being expressed to be made "subject to the payment of such land revenue and other cesses as may from time to time be assessed according to the terms of settlement and to the conditions specified in the

administration paper and other settlement records." As a matter of fact, however, no conditions had been so specified, as no administration paper had been executed by the Zamindar of Khariar and the other zamindars at the settlement of 1869.

On 6th June 1888, the Government decided and directed that the police administration in the plaintiff zamindaris (excepting those of Khariar and Bindra Nawagarh) should be withdrawn, and an addition made to the takolis or revenue payable by the zamindars thus relieved of police duties, and since 1888 the administration of the police in those zamindaris had been carried on by the Government,

On 6th March 1891, the Zamindar of Khariar accepted a fresh assessment of his takoli or revenue payable to Government under section 54 of the Central Provinces Land Revenue Act (XVIII of 1881) for 11 years from 1st July 1890 to 30th June 1901, or until a fresh settlement should be made, and he agreed to be bound by all the conditions laid down in the *wajib-ul-arz* of his zamindari, which he executed on the same date.

On 1st September 1892, the police administration of the zamindaris of Khariar and Bindra Nawagarh was withdrawn and assumed by the Government, and on 17th November 1892 a new form of *wajib-ul-arz* applicable to the non-feudatory zamindars in the Raipur district, including the plaintiffs, was sanctioned, though it was not then brought into use.

In 1893 the Chief Commissioner, with the sanction of the Government of India, assumed the administration of the excise, giving the zamindars compensation for the withdrawal of that source of revenue, and granting them farms of the excise administration, the takolis therefor to run with their land settlements. Some of the zamindars accepted the compensation and

1912

BIR BIKRAM DEO v. SECRETARY OF STATE FOR INDIA.

took farms of the excise, whilst others, including the plaintiffs, the Zamindars of Khariar, Suarmar, Narra and Sahaspur Lohara, refused both.

On 1st May 1903, the Chief Commissioner of the Central Provinces decided to resume the administration of pounds from the non-feudatory Zamindars in the Chattisgarh Division, granting them compensation for the withdrawal of that source of revenue.

In 1903, in connexion with the new assessment of revenue, the non-feudatory Zamindars of the Chattisgarh Division, including the plaintiffs, were required to execute the *wajib-ul-arz* in the form then adopted and sanctioned by Government, which with certain amendments was that sanctioned on 17th November 1892. The *wajib-ul-arz* was of date 6th August 1903, and as they considered some of the entries prejudicial to their interests, they instituted the suits now under appeal.

By the plaint in suit 6 of 1904 (appeal 42 of 1910) the plaintiff Bir Bikram Deo, Zamindar of Khariar, alleged that the following clauses in the *wajib-ul-arz* executed by him under protest on 6th August 1903 were in derogation of his rights under his sanad of 25th November 1874, and of his rights and privileges long enjoyed by him and his predecessors, and were illegal and *ultra vires*, and that Government had no authority to insert them except by some special enactment.

PART I.

OF THE RIGHTS AND LIABILITIES OF THE ZAMINDAR AS AGAINST GOVERNMENT.

Clause III.—Removal of Zamindar and Forfeiture of Privileges.

The Zamindar in the case of gross misconduct or maladministration is liable to removal by the Chief Commissioner. Such removal may be temporary (in which case the Deputy Commissioner will manage the estate on behalf of the Zamindar) or it may be permanent. If permanent

removal be ordered, the succession shall take place as if the Zamindar removed had died.

Clause VI.—Assigned Revenues.

If at any time it is considered expedient to assume the management of Ferries and Pounds, the Zamindar shall receive reasonable compensation in respect of any loss of income resulting from such transfer.

Clause VII.—Forests.

The zamindari forest mahals shall be managed in accordance with the rules which may from time to time be framed by the Chief Commissioner under Section 124 A of the Central Provinces Land Revenue Act.

Clause X.—Minerals.

All minerals are the property of Government, which has a right of free access and egress thereto and therefrom.

PART II.

OF THE RELATIONS OF THE ZAMINDAR WITH GAONTIAS AND RAIYATS.

Clause II—Discontinuance of Nazarana.

The Zamindar will discontinue the practice of levying præmia (*nazarana*) when granting or renewing leases, and will receive in lieu thereof an annual payment calculated on the rental value of the land in the Gaontia's own cultivation.

Clause VII.—Of Kotwars and their Remuneration.

The appointment, suspension and removal of Kotwars are governed by the rules framed under section 147A of the Central Provinces Land Revenue Act.

Clause XI.—Village Waste.

(i) Forest lands in the estate will be managed in accordance with any rules which may be made by the Chief Commissioner.

Clause XV.—Disposal of Hides and Carcasses.

The hides and carcasses of dead cattle are the property of their owner, who is at liberty to make any disposition of them he may deem fit.

The relief prayed in the plaint was that the above clauses should be deleted, and for further and other relief that seemed fit.

The District Judge held in suit 6 of 1904 that the Chanda Patent did not bind the plaintiff, or constitute the terms on which he held his zamindari. With regard to the clauses objected to in the *wajib-ul-arz* of 6th August 1903, he held that clause 3 of Part I (Removal

1912

BIR BIKRAM DEO v. SECRETARY OF STATE FOR INDIA.

of Zamindar), clause 7 of Part I (Forests), and clause 2 of Part II (Discontinuance of Nazarana) were not binding on the plaintiff, but that he was bound by all the other clauses to which he had taken objection. His decree directed the deletion of the clauses which were not binding and dismissed the plaintiff's claim as to the remainder.

Both parties appealed to the Judicial Commissioner (Mr. H. V. Drake-Brockman) who, agreeing with the District Judge, held that the plaintiff was not bound by any term of the Chanda Patent. He allowed the plaintiff's appeal so far as it related to "cattle pounds" in clause 6 of Part I of the *wajib-ul-arz;* and allowed the appeal of the Secretary of State in regard to clause 7 of Part I. In other respects he affirmed the decision of the District Judge as to the clauses of the *wajib-ul-arz* which were objected to.

The material portions of the Judicial Commissioner's judgment were as follows:—

Dealing first with the plaintiff's appeal, I observe to begin with that the 11th ground was not pressed in argument. Khariar is a Scheduled District appearing as serial No. 1 in Part VI of the first schedule to Act XIV of 1874. As originally framed the second sentence of section 1, Land Revenue Act, included the words and figures "except those specified in Part VI of the first schedule of the Scheduled Districts Act, 1874," which were repealed by the amending Act, No. XVI of 1889. It follows that since the 29th October 1889, when the last mentioned Act came into force, the Land Revenue Act, 1881, has been running in Khariar.

Following the order of the arguments advanced by the plaintiff's learned counsel, I take up next the 4th, 16th and 17th grounds of appeal. The argument here is that the *wajib-ul-arz* or administration-paper referred to in section 77 (*d*) of the Land Revenue Act is identical with the record-of-rights prescribed by section 79; that the entries complained of do not represent the outcome of inquiries made under chapter VI of the Act; that no rules of the kind contemplated by section 79 (*b*) have been made; that consequently the clauses in question could not legally be included in the *wajib-ul-arz;* and that the form of chapters III—VI indicates that the procedure therein laid down was not intended to apply to zamindaris. I do

not think there is any substance in the last part of this contention. For settlement purposes a zamindari is treated simply as an aggregate of villages ; the assets of each village are determined and made the basis of a *kamil jama*, *i.e.*, the revenue which would be payable if the village were an ordinary *malguzari* one ; and, finally, a certain share of the aggregate of these *kamil jamas* is made payable by the Zamindar in the shape of what is technically called a *takoli* : see paragraph 157 of Carey's, and paragraph 3 of Scott's Settlements Report. The term "mahal" as defined in section 4 (7) of the Land Revenue Act is a perfectly general one and may therefore be applied to a zamindari as a whole. In the absence then of anything to indicate that the Settlement of 1899—1902 was not effected under the Land Revenue Act, I would assume that it was so effected. That the administration paper and the record-of-rights are not identical seems clear from section 80 of the Act read with paragraphs 278, 279, 280 and 266 of the Settlement Code, and also from the fact that two such different expressions are used in sections so close together. The results of inquiries prescribed by sections 68—70 and 72 must find place in the record-of-rights, which moreover is to consist of "papers," not of only one paper ; but it is certainly not the practice to include in the *wajib-ul-arz* the results of inquiries under those sections, the obvious place for recording those particular results being the *khewat*, *khasra*, *jamabandi*, etc. The fact, however, remains that there is no section except No. 79 which gives the Settlement Officer power to make entries in any part of the record-of-rights. Rules under section 79 or section 80 to have the force of law must be published as required by section 162 and admittedly no such rules have yet been so published : see in this connection paragraph 2 of the preface to the Settlement Code. On the 27th issue the lower Court treated section 77 as giving power to prepare the administration paper, whereas it does no more than authorise the determination of certain disputes. On the 28th issue the view taken seems to be that inasmuch as the Chief Commissioner sanctioned the *wajib-ul-arz* in the Secretariat letters above cited all entries in it were legally made. I am unable to concur in this view, and I hold that, failing effective rules of the kind contemplated by section 79 (*b*), no clause in the *wajib-ul-arz* can be justified unless it embodies a result of the kind covered by section 79 (*a*). This conclusion does not, however, help the plaintiff ; for unless his suit relates to entries as to matters referred to in section 78 and so comes within the scope of section 83, it is incompetent, inasmuch as section 152 (*b*) (8) deprives the Civil Court of jurisdiction over the formation of the record-of-rights. In short, as I understand the position, the plaintiff's suit would have to be dismissed altogether, if it were once conceded that the clauses in the *wajib-ul-arz* of which he complains do not embody decisions as to matters referred to in section 78. He certainly did

1912

BIR BIKRAM DEO v. SECRETARY OF STATE FOR INDIA.

not plead in the lower Court that the clauses were not the outcome of inquiries, and it is too late for him to raise such an objection now.

The 14th ground seems to me to state what the law is without thereby furnishing much aid to the decision of the present dispute. If a particular right was expressly or impliedly granted by the British Government to the Zamindar, it certainly could not be taken away otherwise than by legislation or by agreement. And it is a rule of interpretation that when an enactment changes or takes away rights it is not to be construed as affecting existing rights, unless there are express words to that effect: *Doolubdass* v. *Ramloll* (1), *Papa Sastrial* v. *Anuntarama* (2), *Javanmal* v. *Muktabai* (3). See also Maxwell on the Interpretation of Statutes, page 427 (4th edition). But in respect of each right in dispute the question wil be —has there been an express or implied grant? And in answering this the Court will have to bear in mind that the British Government is not to be necessarily regarded as having maintained the Zamindar, after cession of his territory in 1826, in the enjoyment of all the rights allowed him by the Marathas: *Secretary of State for India* v. *Kamachee Boye Sahaba* (4), *Cook* v. *Sprigg* (5).

In dealing with the rest of the plaintiff's appeal, I will assume, for a reason already stated, that the Chief Commissioner was competent to order insertion in the *wajib-ul-arz* of all the clauses to which the plaintiff objects, subject, however, to the power of the Civil Court to cancel or amend any entry under section 83 of the Land Revenue Act.

The three opening grounds relate to clause 6 in Part I of the *wajib-ul-arz* which runs thus(see *ante* p., 623):—

The plaintiff, in connection with this and with all the other clauses he objects to, repudiates altogether the Chanda Patent. He points to the *sanad* of the 25th November 1874 as recognising that absolute proprietary rights over his zamindari were already vested in him. He urges that the concluding words—"and (subject) to the conditions specified in the Administration Paper and other Settlement records"—should be altogether ignored, as there are no such papers embodying any conditions in the case of his zamindari.

It is admitted* by the defendant that no Administration Paper for Khariar existed in 1874, and also that any Settlement records, there may have been then, contain nothing relevant in the matter in hand. Would it in these circumstances be reasonable to treat the *sanad* as recognising all that the Zamindar now claims in respect of pounds

* See the remarks on Raipur District in Fuller's "Translations of Specimen Forms of *Wajib-ul-arz*" (1885).

(1) (1850) 5 Moo. I. A. 109, 126.
(2) (1880) I. L. R. 3 Mad. 98, 101.
(3) (1890) I. L. R. 14 Bom. 516, 525
(4) (1859) 7 Moo. I. A. 476.
(5) (1898) 68 L. J. P. C. 144.

and ferries? I think not. Reading together the letters of August and September 1874, copies of which form the defendant's exhibits 13, 14 and 15, it seems clear that the plaintiff was intended to receive not only a copy of the ordinary *malguzari sanad* modified by substituting the word "zamindari" for the word "mouzah," but also one of a *wajib-ul-arz* similar to that issued to each Bilaspur Zamindar. That intention was, for some reason not now ascertainable, left unfulfilled. But I cannot think that the plaintiff is entitled to take the *sanad* as it stands alone, for it does not convey the real intention of the grantor. If it is not to be regarded as subject to the Chanda Patent (slightly modified), on what principle is it to be construed as recognizing a right to control ferries and pounds? No reference to such rights is ever made in the *wajib-ul-arz* of the ordinary *malguzari* village, and it is significant that even in the Chanda Patent the rules obtaining in the *khalsa* tracts are expressly cited as applicable to the levy of fees at ferries and pounds. I would therefore treat the *sanad* of 1874 as doing no more than vest the formal and legal title to the villages of the zamindari in the then Zamindar: see *Loknath* v. *Bissessarnath* (1). Nor do I see sufficient *primâ facie* reason to hold that in 1874 the plaintiff was not governed as to ferries by the Saugor and Nerbudda Rules applied in 1855 to the Nagpur Province (pages 92 and 324, Nicholls' Law of the Central Provinces) or as to pounds by the Cattle Trespass Act, 1871. The latter Act undoubtedly extended to Khariar, for the preamble excluded from its operation only "the Presidency Towns and such districts or tracts of country as the Local Government, with the sanction of the Governor-General in Council, may exclude from its operation." With these exceptions the Act was in character general and applicable to the whole of British India. Further it was not included in the first schedule of the Laws Local Extent Act, 1874. Consequently, there was no need for the Chief Commissioner to issue a declaration under section 3 (*a*) of the Scheduled Districts Act, 1874, in order to keep it in force. In this connection I have further to remark that when the *sanad* of November 1874 was given, the Scheduled Districts Act had not received the assent of the Governor-General. The Northern India Ferries Act, 1878, came into force in the Central Provinces on the 1st April 1879 (Notification No. 1457, dated 26th March 1879): section 4 (*b*) expressly empowers the Local Government to take possession of any private ferry, and section 5 requires compensation to be paid. Assuming that all ferries in Khariar were private ferries in 1903 and that they belonged to the Zamindar, his rights may under this express provision be taken away, and so far as clause 6, Part I of the *majib-ul-arz* contemplates this and the grant of reasonable compensation I hold that the clause cannot be interfered with. With

(1) (1899) I. L. R. 27 Calc. 103, 114.

1912

BIR BIKRAM DEO v. SECRETARY OF STATE FOR INDIA.

regard to cattle-pounds the position is to my mind appreciably different Act I of 1871 followed and repealed Act III of 1857 *in pari materia*; yet we find that the modified Patent approved in 1874 by exhibit D-13 for the Raipur Zamindars allowed them to levy pound-fees under the rules obtaining in the *khalsa* tracts, while it is nowhere suggested that the pounds in the zamindaris were established as required by the later Act (section 4). Clearly, therefore, the pounds in Khariar were both established and managed by the Zamindar. The Act does not expressly provide for confiscating private rights, nor does it lay down that there shall be no pounds save those established by the District Magistrate. In the face of these facts, I am unable to see how the action of the Government in 1874 is explicable except as a recognition of rights vested in the Zamindar. To say that the Zamindari is a rugged and remote tract where it would have been difficult for the District Magistrate to make and enforce such arrangements as are contemplated by sections 4, 5, and 6 of the Act, is to furnish a reason for allowing the Zamindar to take the District Magistrate's place, not to show that this course was the outcome of something other than an admission that the Zamindar had a right to occupy that position. Not till 1892 were any steps taken indicative of a denial that the Khariar pounds had been placed permanently under the Zamindar, and even then the denial took the shape of a clause in a *wajib-ul-arz* which the Zamindar has not at any time accepted as binding upon him. I hold that there was an implied grant to the Zamindar of the right to manage the pounds established by him and to receive the fees therefrom and that there is nothing in the Cattle Trespass Act to affect that grant. The words "and pounds" will accordingly be deleted from clause 6 of the *wajib-ul-arz* as prayed.

I come next to five grounds of appeal 6, 7, 8, 9, and 10 relating to clause 10 of the *wajib-ul-arz* of which the terms are these (see *ante* page 623). The lower Court has found on its 17th issue that section 151, Land Revenue Act, gives the minerals to Government, that the Zamindar had no proprietary rights of any kind till November 1874 when he received his *sanad*, and that the *sanad* cannot be regarded as even giving at its date the mines and minerals. In this Court the plaintiff relies again upon *Sriram Chakravarti* v. *Hari Narain Singh* (1) and cites also *Megh Lal* v. *Giridhari Singh* (2). In my opinion section 151, Land Revenue Act, is by itself a sufficient answer to this part of the claim. That the section was intended to operate on records and grants already made is indicated by the fact that in any other view the commencement of its operation would have been long postponed. Settlements in the Central Provinces

(1) (1905) I. L. R. 33 Calc. 54. (2) (1906) 5 C. L. J. 208.

ran for the most part for 30 years from 1865 or thereabouts, and had it been desired to provide only for the future, executive orders would have amply met the object in view. That the general policy of Government was everywhere to retain the right to mines and minerals appears from the *wajib-ul-arzes* in Fuller's Collection (1885) and from the Chanda Patent issued in 1868.

The 12th ground of appeal is directed against the following clause (No. 7) in Part II of the *wajib-ul-arz* (see *ante*, page 623). With this may be compared the corresponding clause in the *wajib-ul-arz* originally issued with Carey's Settlement which was reproduced *verbatim* in the revised form of November 1892 :—" The Zamindar may, subject to appeal to the Deputy Commissioner, dismiss a kotwar for continued misconduct or failure to perform his duties, and may appoint a man in his stead. The Deputy Commissioner may call upon the Zamindar to dismiss a kotwar offending in any such way, and if the Zamindar fails to comply, the power of dismissal is vested in the Deputy Commissioner." The issue in this connection is No. 19, worded thus : "No. 19. Is the provision relating to Kotwars made in Part II, clause 7 of the *wajib ul-arz* in accordance with the provisions of section 147 A of the Land Revenue Act and the rules made thereunder ? Is it binding on the Zamindar ? " The lower Court held that these rules, being binding on the plaintiff and framed on the lines of Carey's original *wajib-ul-arz*, have properly been entered in the new *wajib-ul-arz*. As to this part of the claim I do not think there is any proof of an express or implied grant empowering the Zamindar to appoint and dismiss kotwars at his pleasure, which is the position he contends for. It is true that Carey's *wajib-ul-arz*, which appears to have been signed by the plaintiff on the 6th March 1891, was prepared after section 147 A was added to the Land Revenue Act. On the other hand, no rules were framed till August 1891. Rule 5 is the one which chiefly prejudices the plaintiff :—"The appointment of village watchmen shall rest with the Deputy Commissioner, provided that in zamindaris the Zamindar may nominate to a vacancy, and the Deputy Commissioner shall appoint the person so nominated if he be qualified in accordance with Rule 4." Rule 8, moreover, gives a Zamindar no power of dismissal :—" A village-watchman may be suspended or removed by the Deputy Commissioner on the report of the mukaddam or of his own motion, etc. etc." The plaintiff then is worse off than under the *wajib-ul-arz* of 1891, and unless it can be held that section 147A of the Land Revenue Act empowers the Government to alter such an arrangement as the one embodied in that document, the plaintiff will, I think, be entitled at least to some amendment of the clause in question. On the whole I incline to hold that the section does give the necessary power. To take the opposite view would land one

1912

BIR BIKRAM DEO v. SECRETARY OF STATE FOR INDIA.

in the admission that each landholder, who till 1891 appointed and dismissed his kotwars, would be entitled to continue doing so, the result being a large exception to the scope of what to be of real use ought to have a general application. I conclude that the plaintiff must submit to the rules, though they reduce his authority below even what it was from 1891 to 1903.

The 5th ground of appeal attacks the finding on the 16th issue which was in the following terms :—"Is the provision relating to forest made in Part I, clause 7, and Part II, clause 11, sub-clause (i) of the *wajib-ul-arz* in accordance with the amended Patent and the Land Revenue Act and is it binding on the Zamindars?" The lower Court has deleted clause 7 of Part I. Clause 11 (i) of Part II has been retained on the ground that it merely reproduces *verbatim* clause 10 (i) of Carey's original *wajib-ul-arz*. There appears to have been some confusion in the Judge's mind for he deals with waste as distinguished from forest land, though the issue has no relation to the former. The plaintiff contends that he is not concluded by the agreement of 1891, inasmuch as it was for the period of Carey's Settlement only. I do not see my way to accepting this view of the agreement. By it the plaintiff admitted that he held forest within village-boundaries subject to any rules the Chief Commissioner might make, and the effect of the admission cannot reasonably be restricted, like the period of the assessment, to a limited time in the future.

Clause 15 of Part II is word for word the same as clause 14 in the *majib-ul-arz* of 1891. I agree with the lower Court in holding that the plaintiff cannot go behind what he accepted as binding in the former settlement. In this instance to allow him to do so would affect injuriously the rights of others.

I need not separately consider the 15th ground of appeal. It is concerned with the lower Court's findings on issues 23—26 and particularly with the effect of the Scheduled Districts Act upon (i) the Land Revenue Act, (ii) the Cattle Trespass Act. I concur generally with the District Judge on these points with which I have also dealt already to some extent in connection with the first three grounds of this appeal.

The plaintiff's appeal having now been disposed of, I turn to the cross appeal (No. 61 of 1906). Here the main contention is that the plaintiff must be regarded as bound by the Chanda Patent as modified in 1874 for application to all the Raipur Zamindars. This is rested on three grounds :—(i) that in paragraph 8 of the plaint in a cognate suit (No. 27 of 1904) brought by the plaintiff he admitted that Government intended to apply the Chanda Patent to him ; (ii) that in paragraphs 9 to 13 of a petition addressed in 1897 to the Secretary of State for India the plaintiff indicated his acceptence of the said Patent ; (iii) that as a matter of law

it suffices for the validity of a grant that the Government should determine on its terms, acceptance by the grantee not being essential.

Paragraph 8 of the plaint in suit No. 27 of 1904 runs thus :—"That on the other hand these (*quasi*-sovereign) rights (to maintain police and control Excise monopolies) were further ratified and confirmed by the Government of India who issued fresh *sanads* the terms of which were similar to those issued and delivered to the Chanda Chiefs. But it appears, and so the plaintiff has been informed, that the *sanads* issued for the Zamindars of Chhattisgarh were owing to some accident or mistake never delivered to them. Nevertheless the Government of India had expressly ordered that the Chanda Patent shall be taken as a general model for continuing the existing arrangements in respect to the non-feudatory Zamindars of Chhattisgarh."

I am clearly of opinion that this paragraph contains no sort of admission which can help the defendant, who moreover does not appear to have relied on it in the lower Court. From paragraphs 5—8 of the plaintiff's written reply in suit No. 27 of 1904 the extent of his reliance on the Chanda Patent may be gathered, namely, that it shows the minimum of rights which must be conceded to the plaintiff. As to the effect of the passages in exhibit D-20, I concur entirely with the lower Court. They describe the terms of the Chanda Patent as wrongly held applicable to Khariar, but use them as an argument to prove that in 1874 the plaintiff was treated as entitled to manage his own police and administer Excise in his zamindari. The position taken was this—as ruler of Khariar the plaintiff's ancestor enjoyed a position superior to that of the Zamindars of Chanda, yet they were allowed to maintain police and administer Excise : *à fortiori* those rights must have been and were recognised as vested in the plaintiff's ancestor. That the terms of the Chanda Patent were not communicated to the plaintiff in 1874 as attaching to the *sanad* given him in that year seems perfectly clear. By 1897 his position had been minutely examined, the inquiry having begun at least as far back as 1891. In any view then of the language used in the petition it would be unsafe to use it as proving acceptance of the Patent which the defendant cannot prove to have been delivered. Then as to the point of law, I am not shown any authority for the position that a grantee from the Crown can be bound by conditions which were never communicated to him. In *In re Antaji Keshav Tambe* (1) the following is quoted from a judgment of Westropp C. J :—"In respect to Crown grants upon a question of the meaning of words, the same rules of common sense and justice must apply whether the subject-matter of construction be a grant from the Crown or

(1) (1893) I. L. R. 18 Bom. 670.

1912

BIR BIKRAM DEO v. SECRETARY OF STATE FOR INDIA.

from a subject, and it is always a question of intention, to be collected from the language used with reference to the surrounding circumstances." It is, I venture to think, a requirement of the same rules of common sense and justice that a person should not be bound by conditions which have never been brought to his notice. Under section 122, Transfer of Property Act, acceptance by or on behalf of the donee is necessary to the validity of a gift, and in *Sheo Singh* v. *Raghubans Kunwar* (1) their Lordships of the Privy Council appear to have assumed (at page 650 of the report) that a *sanad* to be binding must be accepted.

I hold then that the plaintiff is not bound by any term of the Chanda Patent. What he got in 1874 was a recognition or conferral—for present purposes it matters not which—of proprietary right. The devolution of that right would, in the absence of stipulation to the contrary, be governed by the ordinary law and the Government cannot legally alter that without express legislation. If the Government could alter the terms of its grant at pleasure, it could also revoke the grant likewise. To a gift divesting a private donor of all his interest in certain property a condition cannot afterwards be attached : *Hussain Khan* v. *Nateri Srinivasa* (2), *Ram Sarup* v. *Bela* (3). And Government cannot, by issuing a subsequent proclamation, resume a grant made by a previous proclamation, inasmuch as it cannot, any more than a private person, without the consent of the donee, revoke a gift actually made : *Collector of Ratnagiri* v. *Vyankatrav Narayan Sarve* (4). It follows that the lower Court has rightly deleted clause 3 from Part I of the *wajib-ul-arz* : to depose a Zamindar, would obviously be to derogate from the original grant to his predecessor.

It remains to deal with a contention that the lower Court was wrong in deleting clause 7 of Part I which runs thus :—"The Forest mahals shall be managed in accordance with the rules which may from time to time be framed by the Chief Commissioner under section 124A of the Land Revenue Act."

In dealing with this the District Judge entirely ignored clause 10 (*i*) of Carey's original *wajib-ul-arz* wherein it is expressly stipulated that the forest lands in the estate will be managed in accordance with any rules which may be made by the Chief Commissioner. I hold, that the plaintiff cannot resile from this agreement merely because the term of Carey's Settlement has expired. The direction to delete this clause will therefore be reversed.

The net result of the two appeals is that the lower Court's decree will be modified by—(i) adding a direction that the words "and pounds" be

(1) (1905) I. L. R. 27 All. 634, 650 ; L. R. 32 I. A. 203, 212.
(2) (1871) 6 Mad. H. C. 356.
(3) (1883) I. L. R. 6 All. 313 ; L. R. 11 I. A. 44.
(4) (1871) 8 Bom. H. C. (A. C.) 1.

deleted from clause 6, Part I of the *wajib-ul-arz* ; (ii) substituting for the words and figures "clauses 3 and 7 of Part I" the words and figures "clause 3 of Part I."

By the plaint in suit 27 of 1904 (appeal 43 of 1910) the plaintiff Bir Bikram Deo alleged that as Zamindar of Khariar he was possessed of quasi-sovereign rights; that the Chanda Patent was intended by the Government of India to be a general model for continuing existing arrangements to the non-feudatory Zamindars of Chattisgarh, but that owing to a mistake it had not been delivered to him; that he had acquired an indefeasible title to the rights and privileges which he and his ancestors had enjoyed; that in 1898 the administration of the police had been withdrawn from him, and an additional takoli had been improperly assessed upon him for police charges, and that the excise administration had been without right withdrawn from him; and he prayed for a declaration that the defendant's action in withdrawing his police and excise rights had been illegal and improper; that the levy of the additional takoli was illegal; and that the defendant should be decreed to pay him the amount of profit from the excise administration in the event of its being held that the plaintiff was not entitled to retain the excise monopoly and for other relief.

The facts of the case are fully stated in the judgment of the District Judge, which also shows the defence and the issues raised and the material portions of which were were follows :—

The plaintiff alleges that the Zamindars of Khariar were at one time independent Chiefs, and as such they exercised all the sovereign rights including Police and Excise monopoly, that even after the cession of the Garhjat States which included Khariat zamindari to the East India Company, the Zamindars of Khariar continued to enjoy the same rights and privileges and maintained their Police force and exercised the sole control over the Excise monopoly, that the Honourable East India Company, and afterwards their successors the British Government, acknowledged

1912

BIR BIKRAM DEO v. SECRETARY OF STATE FOR INDIA.

and ratified these sovereign or quasi-sovereign rights as appurtenant to the zamindari, that the conferral of the proprietary rights in the zamindari made in 1874 by means of a *sanad* under the signature of the Chief Commissioner, Sir Richard Temple, was not intended to supersede or abrogate the enjoyment of the rights which the plaintiff's ancestors were enjoying for many hundred years, and that these rights were further ratified and confirmed by the Government of India who ordered the issue of fresh *sanads* to the Chhattisgarh Zamindars on the lines of Chanda Patent and which were by mistake not issued.

On these allegations the plaintiff states that whether by a grant express or implied or by long enjoyment or by adverse possession and enjoyment or by the fact of the rights being appurtenant to and having become inseverable incidents of the tenure, the plaintiff has acquired an indefeasible title to the rights and privileges which he and his predecessors have continuously, openly, and uninterruptedly been enjoying with the knowledge and concurrence of the British Government and of the Honourable East India Company.

As the defendant withdrew the right of the plaintiff to levy and maintain Police in his estate, and the plaintiff was made to pay annually a sum of Rs. 1,656 on account of Police charges over and above *takoli* and cesses payable by him and also as the Excise monopoly has been withdrawn from the plaintiff, the pressnt suit has been filed to obtain the following reliefs : (i) That it be declared that the action of the defendant in withdrawing the Police and Excise rights is illegal and improper ; (ii) that the sum of Rs. 1,656 paid under protest by the plaintiff to the defendant in the shape of Police contribution be decreed to be paid back by the defendant to the plaintiff and that it be declared that the defendant has no right to levy it ; (iii) that in the event of the Court holding that the plaintiff is not entitled to the Excise monopoly, it be ordered that the defendant do render an account to the plaintiff of the said monopoly managed by the defendant and do pay and deliver to the plaintiff such sum or sums as may be the annual profits accruing thereon ; (iv) that Rs. 3,100 being the estimated profits from the Excise monopoly for the year 1903-04 ordered to be paid by the defendant to the plaintiff ; (v) that the defendant be ordered to pay the costs of the suit.

The question of the applicability of the so-called Chanda Patent has been decided in the sister case, No. 6 of 1904, and it has been found that the Zamindars of Raipur are not governed by its conditions. For reasons given in that judgment, I find that the Chanda Patent does not bind the plaintiff and accordingly I decide issues 6, 7, 8 and 10 against the defendant.

Issues 1, 2, 3 and 4. Amongst the Raipur zamindaris, Khariar and Bindra Nawagarh formed part of Garhjat States. Khariar and Bindra

Nawagarh zamindaris were ceded to the Honourable East India Company by the Nagpur Raja by the treaty of 1826 : *vide* Aitchison's Treaties, Vol. VIII, pages 527 and 535.

The other Zamindars of Raipur who have brought similar suits, *i.e.*, the Zamindars of Dhondi-Lohara, Suarmar, Sahaspar-Lohara, Narra and Fingeshwar formed part of Chhattisgarh which by Article 9 of the Treaty of 1826 was placed under the British management on behalf of the Nagpur Raja to provide funds for the up-keep of the military establishment. By Article 1 of the Treaty, dated the 26th December 1829, Chhattisgarh was given back to the Nagpur Raja : *vide* Aitchison's Treaties, vol. VIII, page 536. The dominions of the Nagpur Raja on his death lapsed to the British Raj in 1853. Accordingly Chhattisgarh was incorporated in the British territories in 1853.

I therefore find that of the Raipur zamindaris Khariar and Bindra Nawagarh were ceded to the British power in 1826, and the other zamindaris lapsed In 1853.

The foundation of the plaintiff's case is that their ancestors were at one time independent Chiefs, and they exercised as such sovereign powers in which were included the power to administer the police and the excise within their estate.

This allegation has been denied by the defendant, and the plaintiff has therefore to prove it. There is no evidence on the point given by the plaintiff ; on the other hand in Sir Richard Temple's Report on the zamindaris filed by the defendant in suit No. 6 of 1904, and marked Exhibit D-1, the history of the Garhjat States is thus given :—"*Paragraph 27.*—The origin of the tenures held by the Sambalpur Garhjat Chiefs is not clearly known. It can only be with certainty alleged that it is very ancient. The earliest authentic information we have of them is, that they were first independent ; then they held in subordination to the most powerful of their number, the Maharaja of Patna. In later times, the Maharaja of Patna was forced to share his supremacy among the Chiefs with his relatives, the Maharaja of Sambalpur, and this was the situation when all fell under the dominion of the Maharattas in A. D. 1755, as Tributaries."

The next official document is Aitchison's Treaties, Volume VIII, Part IV. Regarding the Garhjat States it is shown at page 499 that they were transferred from time to time from the dominion of one Government to the other. That their position was one of utter subordination to the ruling sovereign of the day has been clearly shown in the book. In 1819 settlements were made with the Chiefs for a limited period. They were renewed in 1827, but though the engagements entered into that year were nominally for five years only, they were not renewned at the expiration of that period. One of these engagements is given at page 545 of Aitchison's

1912

BIR BIKRAM DEO v. SECRETARY OF STATE FOR INDIA.

Treaties, Volume VIII. Separate engagements, of which one is given at page 546 of the book above referred to, were taken at the same time from each Chief, binding him to use rightly the judicial and police powers entrusted to him: *vide* page 499 of Aitchison's Treaties, Volume VIII. The foundation upon which the case rests is thus not made out: on the contrary it is shown by the only evidence now available that whatever powers the Zamindars exercised, they exercised them in complete subordination to the rulers of the country for the time being from whom such powers were derived and on whose pleasure their continued exercise entirely depended. The Treaty of 1826 shows that the cession took place by right of conquest.

After referring to the right of absolute sovereign power of a conqueror to deal with the rights and privileges, public or private, existing in a conquered country as stated by Cockburn C.J. in his charge to the grand jury in *The Queen* v. *Nelson* in 1867, and referring to *Cook* v. *Sprigg* (1), and *Rustomjee* v. *The Queen* (2), as showing that a conqueror can recognise or refuse to recognise such rights as he pleases, the judgment continued:—

It thus becomes necessary to see how the British Government dealt with the Zamindars when they came under its rule. As regards Garhjat Chiefs, as stated already, each Chief was made to enter into a separate engagement binding him to use rightly the judicial and police powers entrusted to him. Thus as shown the Zamindars did not exercise the police right as a matter of right, but did do so on delegation of the power from the paramount authority. No doubt the engagement of 1827 was not renewed, but this does not change the position of the Zamindars. The Zamindars administered the police on delegation from the sovereign and it is not shown that subsequently they claimed to exercise it as a matter of right and this claim was recognized by the sovereign.

From the fact that the police duties were delegated by the engagement above referred to to the Zamindars, it is reasonable to presume that the British power refused to recognize any right in the Zamindars to administer the Police in the zamindaris as a matter of right and power on the country passing to the British power by cession in 1826 A.D. I therefore hold that on cession of Garhjat States, the British power did not recognize the Police powers of the Zamindars, and that after the cession, the Garhjat Zamindars

(1) (1898) 68 L. J. P. C. 144. (2) (1876) 46 L. J. Q. B. 238.

administered the Police in their zamindaris by virtue of authority vested in them by the Government, *i.e.*, by delegation from the sovereign power. It is also found that after the cession of Garhjat States the Garhjat Zamindars did not exercise the Police powers as of right independently of the sovereign power.

When in 1863, Sir Richard Temple began his inquiries into the status of Zamindars, no rights of the kind in dispute had been recognized by the Government in their favour and there was nothing in the circumstances under which the territories, in which their estates were situate, had come under British Rule, to tie up the hands of Government to deal with them as it thought fit. The Treaties with the Bhonsla Raja did not impose any restriction of any kind in this respect.

The final decision of the Government regarding the Zamindars, who have filed suits against the Secretary of State, as the result of the enquiry set on foot in 1863, was to recognize two classes of Zamindars—Feudatory and non-feudatory. To the former independent status was given qualified by political control, the latter (in which class the plaintiff is included) became ordinary British subjects without any attribute of sovereignty : *vide* Exhibit D-3 and Exhibit D-4, filed in suit No. 6 of 1904.

This decision of the Government cannot be questioned by the Court, *first*, because it is a decision regarding rights of persons who had been brought under British Rule by right of cession and as such it is an act of State, and, *secondly*, because it was open to Government to give or withhold whatever rights it thought proper, and its powers in this respect are not subject to control by the Court. Police and Excise rights are sovereign rights. No person can exercise these rights except by delegation or as sufferance from the Sovereign. On the cession of territories in 1826, the Zamindars were made to enter into separate engagements with the British power.

As the zamindaris were settled with the then Zamindars for a period of five years, it can be well said that they held their estates from the British power, and the exercise of any Police and Excise rights in the zamindaris was by virtue of delegation of the powers from the Government. I am fortified in this assumption by the fact that the Government subsequently decided to make the Zamindars, who were held to be non-feudatories, ordinary British subjects, and did not recognize any sovereign or quasi-sovereign rights in them.

In 1874, proprietary right *sanads* were granted to the Zamindars, and by this only proprietary rights in the zamindaris, and not sovereign or quasi-sovereign rights were vested in the Zamindars. This excludes the idea that by this *sanad* the Government confirmed Police and Excise rights which are incidents of sovereign rights in the soil and over its inhabitants, and which are not incidents or attributes of proprietary right in the soil. I think that

1912

BIR BIKRAM DEO v. SECRETARY OF STATE FOR INDIA.

the grant of the proprietary right *sanad* shows that the rights sovereign or quasi-sovereign in their character were not only not confirmed or recognized, but were, though not expressly but by necessary implication, refused to the grantees of the *sanad*.

In this view I hold that the exercise of Police and Excise rights by the Raipur Zamindars after cession was not by virtue of any right, but that the rights were exercised on sufferance of, or by delegation from, the sovereign power.

The question of the exercise of these rights before the period of cession does not arise and is not therefore decided.

Issues 11 and 12. The question involved in issue 11 is whether the resumption of the Police and Excise administration was made by the Government in its executive capacity and in the exercise of its sovereign powers. First let us see as to what are Police powers. They are subversive of the ordinary rights of the subject. They include power to deprive him of his liberty, to arrest him and to keep him in confinement. They also involve interference in various other directions with ordinary rights. No private person can exercise these rights except to the extent allowed by law. Society will cease to exist and private rights will disappear if any and every man can assume at his pleasure the powers of the Police. Similar considerations, though not to the same extent, apply also to Excise. One cannot, except under authority conferred by law, deprive any person of his right to manufacture his own liquor and sell the same to such persons as choose to purchase it of him. Nor can one issue license to manufacture giving a monopoly to one's licensee on payment of license fees. As the Zamindars are not sovereigns in their respective estates but only private land-holders, they cannot exercise either of these powers. Even if they have exercised them for years together in the past, they cannot acquire thereby a legal right to exercise them in future, for the simple reason that sovereign rights cannot be acquired adversely by long possession against the Paramount Power. Thus Police and Excise powers being part of and attributes of sovereignty [(cf. *Nobin Chandra Dey* v. *The Secretary of State in India* (1)] cannot be exercised as of right by any private person. Equally their exercise by any person cannot be resumed by any one but the soveregin power.

The Governor-General of India in Council directed the Local Government in their letter No. 625-65, dated 23rd March 1892 (marked Exhibit D-6), to take an early opportunity to relieve the Zamindars from the Police duties, and to assume the jurisdiction with respect to Abkari exercised by the Zamindars. In accordance with these instructions, the Police and Excise administration were resumed from the 1st September 1892 and 1st

(1) (1875) I. L. R. 1 Calc. 11, 14.

April 1894 respectively. The resumption was, therefore, made at the instance of the Government of India under orders passed and issued in their executive capacity.

Whether this act of resumption was done by the Government of India in exercise of their sovereign powers is the next question for decision. Any act done by the Government of India may be said to be an act done by them in the exercise of the sovereign powers, but owing to the fact that the Honourable East India Company was also a trading corporation, nice distinctions have cropped up between acts done in exercise of sovereign powers and acts otherwise done by the Honourable East India Company. Sir Barnes Peacock C.J. in the celebrated case of *The P. and O. Steam Navigation Company* v. *The Secretary of State for India* (1), has said as follows :—"But where an act is done or a contract is entered into, in the exercise of powers usually called sovereign powers, by which we mean powers which cannot be lawfully exercised except by sovereign, or private individual delegated by a sovereign to exercise them, no action will lie." From this I infer that such acts can be called or termed acts done in the exercise of sovereign powers, which could not have been lawfully done by any one who was not a sovereign or delegated by the sovereign to perform them. No subject can levy and maintain Police nor can he regulate the Excise monopoly. Equally no one could have undertaken the resumption of Excise and Police administration of the zamindaris, unless he was deputed by the sovereign to do so, and if he did, his act would have been unlawful and illegal.

Therefore the act of resumption of the Excise and Police administration by the Government was an act done in the exercise of its sovereign powers. I accordingly find that the resumption was made by the Government in its executive capacity and in the exercise of its sovereign powers.

The last question for decision that arises in this connection is the subject of the 12th issue. It is, whether the present action is maintainable, *i.e.*, in other words, have the Civil Courts jurisdiction to determine the propriety of the action of the Government.

This question is a very difficult one, and after giving it very best consideration that I possibly could, I have come to the conclusion that the present action is not maintainable.

The Government of India Act of 1858 (21 and 22 Vict., c. 106, section 67) lays down that the Secretary of State for India in Council can be sued in respect of those matters for which the East India Company could have been sued. In India, until 1858, the Government was vested in the East India Company. That Company exercised different functiona. It

(1) (1861) 5 Bom. H. C. App. 1, 14.

1912

BIR BIKRAM DEO v. SECRETARY OF STATE FOR INDIA.

was partly a trading Company, with the rights and liability of an ordinary commercial body. It also exercised Sovereign powers delegated to it by the Crown. In respect of its acts in the former capacity it could be sued. For its acts in the latter capacity it could not. In 1858, the East India Company came to an end and since then India has been governed directly by the Crown. By Statute 21 and 22, Vict., c. 106, sections 1 and 2, the territories and revenues of India were transferred to the Crown. In order, however, that no one should be deprived of any right or claim which he might have had against the East India Company, section 65 of that statute provided that the Secretary of State for India in Council as a body corporate (not personally, see section 68) might be sued in all cases in which the Company might have been sued. Thus the Secretary of State in Council now stands in the position of the Company and can be sued in cases in which the Company could formerly have been sued. But it could not have been sued in respect of acts done by it as a sovereign power, but only in respect of acts which did not fall within that category [vide *Secretary of State for India* v. *Kamachee Boye Sahaba* (1)]. The liability of the Company is now the liability of the Secretary of State.

After citing the decisions of the Courts in India in reference to the question he was discussing, the judgment proceeded :—

This is all the Indian case law on the subject. It hasalready been held that the liability of the Secretary of State to be sued in Municipal Courts follows the liability of the East India Company, and that the act of defendant complained of is an act done by the Government in the exercise of its sovereign powers. By applying the principle of law laid down by the cases quoted by me to the facts as found by me, the conclusion is irresistible that the present action is not maintainable, and I find therefore that the present suit relating to the resumption of Police and Excise administration does not lie. Issues 16 and 17 :—The management of the Police of all Zamindaris having been resumed the "*takolis*" of the Zamindaris were enhanced on that account.

The subject has been dealt with in Mr. Carey's Settlement Report, and I quote below his words :—

"Paragraph 162. The management of the Police of all Zamindaris, excepting Bindra-Nawagarh and Khariar, has been assumed by Government. A sum of Rs. 3,540 has been distributed rateably over the *takolis* of the six zamindaris—(i) Parpori, (ii) Barbaspur, (iii) Gandai, (iv) Silheti, (v) Sahaspur-Lohara, (vi) Thakurtola, as the annual cost imposed on

(1) (1859) 7 Moo. I. A. 476, 555.

Government by the decision to bring the estates under the control of the regular police.

The management of Narra, Suarmar, Kowria and Deori has also been resumed, but in consideration partly of their poverty, and also in view of the fact that they could be brought under regular police without extra cost to Government, their *takolis* have not been enhanced on this account."

The management of Police in Khariar and Bindra-Nawagarh was assumed by the Government in 1892, and the Settlement Report was signed by the Settlement Officer on 31st March 1891.

Mr. Fuller (now Sir J. B. Fuller) as Settlement Commissioner in forwarding the Settlement Report to the Government did not touch upon the question of police *takolis*. The Local Government in Chief Secretary's letter No. 4695, dated 25th October 1894, addressed to the Government of India, submitted the Raipur settlement report for the confirmation of the Government of India. But this time the Khariar and Bindra-Nawagarh Police Administration was assumed by the Government. The subject of police *takoli* is thus referred to therein :—

"Paragraph 18. With the advance of civilisation and the increase of crime, plural responsibility in matters of police administration became undesirable, and it was decided at this settlement that Government should take upon itself the duty of maintaining law and order in all zamindaris of the district, except Bindra-Nawagarh and Khariar, a proportion of the cost of the extra police required being added to the *takoli* of each zamindari. Since the conclusion of the settlement police powers have been withdrawn from these zamindaris also, a sum of Rs. 1,656 being added to the *takoli* of each estate on that account."

The Government of India by their letter No. 107-353, dated 10th January 1895, confirmed the settlement of the Raipur district reported in Mr. Priest's letter No. 4695 above referred to.

These are the admitted facts in the case.

The plaintiff urges that the levy of police *takoli* was an impost pure and simple and not *takoli* in any sense of the term, and that the realization of this *takoli* by the defendant was an illegal act which could be inquired into by the Civil Courts. Reliance is made on the following cases :— *Balwant Singh* v. *Secretary of State for India* (1), *Narayan Venku* v. *Sakharam Nagu* (2), and *Collector of Sea Customs* v. *Punniar Chithambaram* (3).

On the other side, it is argued that the revenue payable by the defendant was increased by the amount of Rs. 1,656, though no doubt on the

(1) (1903) I. L. R. 25 All. 527, 532 ; L. R 30 I. A. 172, 175.
(2) (1887) I. L. R. 11 Bom. 519.
(3) (1876) I. L. R. 1 Mad. 89.

1912

BIR BIKRAM DEO v. SECRETARY OF STATE FOR INDIA.

consideration of the fact that the police administration was taken from the Zamindar by the Government, and that the total amount assessed and made payable by the plaintiff was *takoli* pure and simple, and therefore the jurisdiction of the Civil Court was barred with respect to the question of the amount of revenue payable by the plaintiff and to the question of the collection thereof under section 152, clauses 3 and 10 of the Land Revenue Act.

The authorities cited do not at all support the contention of the plaintiff, and it is therefore needless to discuss them in detail.

The assessment made can be offered by the Settlement Officer to the parties concerned before the final settlement report is confirmed by the Government. Under powers conferred on the Chief Commissioner by section 53, Land Revenue Act, the assessment proposed and offered by the Settlement Officer is subject to revision by the Chief Commissioner before it is confirmed by the Governor-General in Council. It is further laid down in the section above quoted that in making the offer of assessment, the Settlement Officer shall state that it is made subject to confirmation by the Governor-General in Council, and subject to revision by the Chief Commissioner at any time upon such confirmation is received. Under this section the Chief Commissioner has powers to revise the assessment offered by the Settlement Officer. In the present case, it is clear that the Chief Commissioner revised the *takoli* payable by the plaintiff before the assessment offered by the Settlement Officer and accepted by the plaintiff was confirmed by the Government of India.

The plaintiff has not alleged anywhere that the Settlement Officer at the time of making the offer had not stated that the assessment offered was subject to confirmation by the Governor-General in Council and also to revision by the Chief Commissioner at any time upon such confirmation is received. As there are no pleadings on the point, I cannot but presume that the Settlement Officer had acted in accordance with law, and that he had made the necessary statement as required by section 53 of the Land Revenue Act. As the *takoli* assessed was revised by the Chief Commissioner and as the revised assessment has been confirmed by the Governor-General, Civil Courts have no jurisdiction to question the validity of the assessment under section 151, clause 3 of the Land Revenue Act. The motives of the Chief Commissioner in revising the assessment cannot be the subject of civil litigation and whatever motives he may have had in enhancing the *takoli* of the plaintiff are beyond the competence of this Court to enquire into and determine. Similarly, the collection of the enhanced *takoli* from the plaintiff by the defendant is a matter expressly excluded from the jurisdiction of the Civil Court : *vide* section 151, clause 10 of the Land Revenue Act.

I therefore find as follows:—(i) That the amount of Rs. 1,656 was added to the *takoli* assessed by the Settlement Officer as payable by the plaintiff, by the Chief Commissioner. (ii) That the enhancement of *takoli* by the said sum of Rs. 1,656 was legal. (iii) That the Court has no jurisdiction to declare the validity or otherwise of the action of the Government in the matter, and to give relief to the plaintiff in respect of Rs. 1,656 collected on account of the enhanced *takoli* from him.

Both the issues Nos. 16 and 17 are decided against the plaintiff.

The result is that the suit of the plaintiff fails and will be dismissed with costs."

Owing to the result of this appeal the decision on the other issues became immaterial.

The plaintiff appealed from that decision to the Judicial Commissioner (Mr. H. V. Drake-Brockman) who, after referring to the findings of the District Judge on issues 6 to 10 with which he agreed, and to the decision of the District Judge on the first four issues to the effect that the plaintiff zamindar never exercised independent sovereign power, but was always in complete subordination to the rulers for the time being of the country, so that the continued exercise of any particular right depended always in the pleasure of those rulers, said:—

This conclusion does not appear to be of much importance, for no matter what the plaintiff's rights were before cession he would not be entitled as a matter of course to exercise them aferwards: see *Secretary of State for India* v. *Kamachee Boye Sahaba* (1) and *Cook* v. *Sprigg* (2). The important question is how he was treated by the British Government; and in this connection I take it as settled law that the Government cannot, any more than a private grantor, revoke without the grantee's consent a grant actually made, or attach without the same consent a new condition: also that the Government is bound like a private person by the doctrine of equitable estoppel: see *Collector of Ratnagiri* v. *Vyankatrav Narayan Surve* (3) and *Ahmad Yar Khan v. Secretary of State for India*." (4).

After stating the other holdings of the District Judge and that "the questions whether the Police Act

(1) (1859) 7 Moo. I. A. 476.
(2) (1898) 68 L. J. P. C. 144.
(3) (1871) 8 Bom. H. C. (A. C.) 1.
(4) (1901) I. L. R. 28 Calc. 693; L. R. 28 I. A. 211.

1912

BIR BIKRAM DEO v. SECRETARY OF STATE FOR INDIA.

of 1861 and the Excise Acts 1856, 1871 and 1881 applied to Khariar, and whether the retention of the powers in dispute would necessarily be illegal as incompatible with the enforcement of those Acts, were left undecided," and after stating the findings of the lower Court on issues 16 and 17, and its decision on the question of limitation, the Judicial Commissioner's judgment proceeded as follows :—

In order to clear the ground I may say at once that in my opinion the defendant cannot—if there was an express or implied grant of the powers in dispute—set up the defence of Act of State. It seems to me that given such a grant the case is governed by the principle explained in *Forester* v. *Secretary of State for India* (1). There a claim in respect of lands seized by the Indian Government on the death of the Begum Samroo was held to be within the jurisdiction of the Courts on the ground that the Begum was not a sovereign princess, but a British subject holding lands in British India under a legal tenure. I would distinguish cases like *Grant* v. *Secretary of State for India* (2), *Shenton* v. *Smith* (3) and *Voss* v. *Secretary of State for India* (4) on the ground that in all the decision turns upon the rule that except where otherwise expressly provided servants of the Crown hold office during the pleasure of the Crown, and this not by virtue of any special prerogative of the Crown, but because such are the terms of each officer's engagement. In the present case, as in *Forester* v. *Secretary of State for India* (1), the rugged and remote condition of Khariar may have been the reason why the Government resumed Police and Excise administration by a political act. The same condition is doubtless an explanation also of the line taken by Government in 1826 onwards. But this condition alone is certainly not sufficient to show that there was no grant of the powers in dispute. In this connection the following remarks of the Lord Chancellor in *Forester's case* seem apposite :—"These considerations (including the abnormal condition of the territory in dispute), though they may explain much of what appears from the record to have taken place, cannot affect the determination of the question under consideration. They cannot alter the legal nature of the acts of Government, or make the resumption, under the assertion of a legal title, of lands claimed adversely by a subject, an arbitrary act of sovereign power against an

(1) (1872) L. R. I. A. Sup. Vol. 10 ; 12 B. L. R. 120.
(2) (1877) 46 L. J. C. P. 681 ; L. R. 2 C. P. D. 445.
(3) [1895] A. C. 229 ; 64 L. J. C. P. 119.
(4) (1906) I. L. R. 33 Calc. 669.

independent State. And even if the state of the law in the territories in question at the time when the act of resumption took place gave—as perhaps it did—a larger power of resumption to the East India Company than it possessed in the regulation provinces, that circumstance would not exclude the jurisdiction of the Courts."

Turning to the history of Khariar in order to ascertain whether or not there was a grant to the Zamindar of Police and Excise powers, I notice to begin with that the plaintiff has not produced any of his old *sanads* issued prior to 1874. From page 499, Volume VIII of Aitchison's Treaties, I find that in 1821 separate *sanads* were granted by Government to all Zamindars of the class to which the plaintiff's predecessor in title belonged, and separate engagements were taken. Probably the Khariar engagement was similar to that of Sonakhan (page 539 *ibid*) paragraphs 5-7 of which indicate the possession of judicial and police powers. Thereafter Khariar like many other Zamindaris was little interfered with up to 1862 when Sambalpur was transferred to the Central Provinces. In paragraph 32 of Sir Richard Temple's Report on the Zamindaris, 1863, the position of Khariar and its fellows was described as follows :—"They (the Zamindars) pay a variable money tribute, which is, in effect, an equitable portion of the public revenues accruing within their jurisdiction ; they exercise judicial powers in the criminal department only as Magistrates under Act XXV of 1861 ; in police matters they are left tolerably free from control ; in respect to civil justice and revenue administration, they have authority ; and a less repressive policy has been pursued towards them than towards the Nagpur Zamindars ; yet, in either case, interference has been more or less exercised."

The correspondence arising out of Sir Richard Temple's Report led to the decision that the Khariar Zamindar was to be an ordinary subject. This result was reached in April 1865. Nine years later it was determined to give the Zamindar a *sanad* based on the Chanda Patent : see India's letter No. 190, dated 10th August 1874. That Patent is to my mind most important evidence in the plaintiff's favour, even though it be not binding on him. The Police Act of 1861 and the Excise Act of 1871 were then in force ; but the Government none the less left Police and Excise arrangements to the Zamindar, and as late as March 1891, when his signature appears to have been taken to the *wazib-ul-arz* printed on pages 183-185 of Carey's Settlement Report as originally issued, there was still no indication that the powers so long enjoyed were to be curtailed or withdrawn. In my opinion all these circumstances furnish ample basis for a conclusion that the powers in question had been granted to the plaintiff. That certainly would be the impression conveyed to his mind by the long course of his exercise of those powers, and the very fact that there were in

1912

BIR BIKRAM DEO v. SECRETARY OF STATE FOR INDIA.

force Acts of the Legislature *primâ facie* inconsistent with that exercise would only serve to strengthen and justify such an impression. I hold, therefore, that in 1892 and 1894 when Government resumed the Police and Excise rights respectively the plaintiff was entitled to maintain his own Police and to administer Excise in his zamindari and that he is still entitled so to do.

With regard to the claim for a refund of Rs. 1,656 the arguments on both sides are those set out in the lower Court's judgment, and I concur with that Court in thinking that the matter cannot be gone into here. The Chief Commissioner has seen fit to enhance the *takoli* and the new figure has been confirmed by the Governor-General in Council under section 84, Land Revenue Act. The jurisdiction of the Civil Court is therefore ousted by section 152 of the Act.

The plaintiff does not press his claim for an account of Excise profits. He asks only for Rs. 3,100 as representing the profits of 1903-04, and this amount the defendant does not dispute. The decree of the lower Court will now be reversed and there will be a decree—(i) declaring that the plaintiff is entitled to maintain Police and to administer Excise throughout his zamindari and further to enjoy the revenue derived from Excise monopolies therein ; (ii) directing the defendant to pay the plaintiff Rs. 3,100 ; (iii) dismissing the rest of the plaintiff's claim."

By the plaint in suit 31 of 1905 (appeal 49 of 1910) the plaintiff, the Zamindar of Khariar, claimed that he and his ancestors had been from time immemorial in uninterrupted possession of the income from cattle-pounds situated within his zamindari; that on 15th July 1904 the defendant through his agent the Deputy Commissioner of Raipur had taken illegal possession of them in spite of the plaintiff's protest and had been enjoying the income therefrom since that date, and he prayed for a declaration that he, the plaintiff, was solely entitled to the income from cattle-pounds then existing or thereafter to be erected within his zamindari, and for damages on account of profits and other relief.

The defence and contentions raised appear in the judgment of the District Judge, which was as follows :—

This is the third case instituted by the Zamindar of Khariar against the Secretary of State for India in Council

Since the institution of the *wajib-ul-arz* case (Suit No. 6 of 1904), the Government has assumed the management of cattle-pounds situated in the Khariar Zamindari. On the allegations, that the Zamindars of Khariar from times immemorial have been in rightful, undisturbed and uninterrupted possession of the income arising from cattle-pounds situated in the zamindari, and that the Government had no right to deprive the plaintiff of the management of, and the income arising from, the cattle-pounds, the plaintiff has brought this suit to obtain the following reliefs :— (i) That the defendant be ordered to pay Rs. 20-11 (the amount representing the cattle-pound income from 1st April 1904 to 15th July 1904 which the plaintiff was compelled to pay under protest to the defendant), and Rs. 979-5 (being the estimated income from cattle-pounds), total Rs. 1,000 to the plaintiff. (ii) That the defendant be ordered to submit the account of income arising from cattle-pounds. (iii) That it be declared that the plaintiff is entitled to the income arising from all cattle-pounds now existing or which may hereafter be erected within the limits of Khariar zamindari. (iv) That such further relief be granted as the Court may deem fit.

On behalf of the defendant it is pleaded that the plaintiff or his ancestors had no right or privilege whatsoever against the Government with respect to cattle-pounds within the Khariar zamindari, that the exercise of jurisdiction in this matter by the plaintiff or his ancestors were entirely at the pleasure of and subject to the will of the Government of India, that the resumption of cattle-pounds is not illegal, on the contrary the action of the defendant is legal under the provisions of the Cattle Trespass Act, 1871 ; that the plaintiff cannot claim income from pounds, that the resumption is an act of State, that the present suit is not maintainable against the defendant on that account, that Rs. 20-11 were not paid by the plaintiff and that the income realized from 15th July 1904 to 1st May 1905 is Rs. 795-6-6. The plaintiff does not press his claim for the refund of Rs. 20-11 and also agreed to claim only Rs. 795-6-6 as income from pounds.

Both parties agreed that the decisions in suits Nos. 6 and 27 of 1904, pending in this Court, should govern the decision in this case. I have held in these cases that the plaintiff was, according to the decision of the Government, classed as an ordinary subject, and that the decision is beyond the competence of the Municipal Courts to challenge. I have also held that the Cattle Trespass Act applies to the zamindaris.

Under the Cattle Trespass Act, the pounds shall be under the control of the District Magistrate, and shall be established at such places as the Magistrate of the District, subject to the general control of the Local Government, from time to time directs (*vide* sections 4 and 5 of the Cattle Trespass Act, 1871).

1912

BIR BIKRAM DEO v. SECRETARY OF STATE FOR INDIA.

It is argued on behalf of the plaintiff that the Act does not prohibit the continuance of pounds other than those sanctioned by the District Magistrates. I think that the Act, by necessary implication, does prohibit it. The plaintiff or rather the owner of a private cattle-pound cannot detain the cattle of other persons, and cannot levy any fines. If he does, he renders himself liable both under the Civil and Criminal law.

The plaintiff contends that he has acquired a right of maintaining cattle pounds, and appropriating the income derived therefrom, owing to his long user. If the right in dispute be a right which is a sovereign right or an incident to or attribute of sovereignty, the plaintiff cannot exercise it any more against the Crown, and has not acquired any claim to the future exercise of the right by long possession, as I have already held that such rights as are attributes of sovereignty cannot be acquired by long possession. If the right is not an attribute of sovereignty, but is a right of an ordinary kind which can be acquired by long possession, the plaintiff haa failed to show that he has exercised it for over 60 years before he was dispossessed from it by the defendant. The right not being an attribute of sovereignty, no presumption, from the fact that the plaintiff had exercised other sovereign rights from a long time, of long user arises in his favour.

To allow the suit to prevail would be to contravene the provisions of Cattle Trespass Act. The income derived from the pounds is directed by the Act to be used for a definite purpose, and it cannot therefore be decreed to the plaintiff.

It is suggested by the plaintiff that his zamindari may be excluded from the operation of the Cattle Trespass Act. In the first place, the Court cannot compel the Executive Government to exercise its powers in this respect. In the second place, even if this is done, it will not legalize the plaintiff's position in this respect. He cannot exercise the right of detaining the cattle of people who are equally with him the subjects of the Crown. I have decided already in the other two cases, that whatever rights the plaintiff enjoyed after the cession, which savoured of the powers or attributes of sovereignty, were exercised on sufferance, and as such the plaintiff can no more exercise them against the will of the Crown.

For these reasons and for reasons given in the other cases, I hold that the plaintiff is not entitled to maintain cattle-pounds in his zamindari, and that the defendant did not act illegally in resuming them. As such the plaintiff cannot claim the income derived from the pounds, which cannot be used otherwise than in accordance with law.

The suit fails and will be dismissed with costs."

1912

BIR BIKRAM DEO v. SECRETARY OF STATE FOR INDIA.

The plaintiff appealed to the Judicial Commissioner (Mr. H. V. Drake-Brockman), whose judgment was as follows :—

This appeal arises out of a suit (No. 31 of 1905) brought by the Zamindar of Khariar against the Secretary of State for India in Council. The cross appeals (Nos. 47 and 61 of 1906) in the Zamindar's cognate suit (No. 6 of 1904) have this day been decided. I hold for reasons stated in the consolidated judgment on those appeals that there has been an implied grant to the plaintiff of the right to maintain and take the fees levied in cattle-pounds of his zamindari : that this grant was not affected by the passing of the Cattle Trespass Act, 1871 ; and that in the face of the plaintiff's unwillingness to surrender the subject of the grant, the Government has no remedy against him except by express legislation. Of the remedies asked for in the plaint that for an account is not pressed and the claim for money is limited to Rs. 795-6-6. The decree of the lower Court is reversed and in lieu thereof a decree will be passed (i) declaring that the plaintiff is entitled by virtue of a grant from the Government to maintain pounds in his zamindari and to receive the fees levied therein ; (ii) directing the defendant to pay to the plaintiff Rs. 795-6-6 ; (iii) dismissing the rest of the plaintiff's claim."

On these appeals,

Sir R. Finlay, *K.C.*, *De Gruyther*, *K.C.*, and *Dr. H. S. Gour*, for the appellants and respondents other than the Secretary of State, contended that the plaintiff Zamindars were entitled to the administration of Police and Excise within the ambits of their own respective zamindaris. The argument taking the case of the Zamindar of Khariar was to the effect that he was at one time an independent Chief, and as such exercised in his zamindari independently and without restriction certain rights including those at present in dispute ; that after the cession to the British Government in 1826 the Zamindars of Khariar continued to enjoy the same rights and privileges as before, and admittedly in the Police and Excise administration exercised the sole control in the zamindari ; that far from molesting the plaintiff's predecessors in the exercise of these (amongst other rights) the East

1912

BIR BIKRAM DEO v. SECRETARY OF STATE FOR INDIA.

India Company, and subsequently the British Government, acknowledged and ratified such rights as belonging and appurtenant to the zamindari; that the conferring of proprietary rights on the zamindar by the Government at the first regular settlement was not intended to supersede and abrogate the enjoyment of such rights which had been so long enjoyed by the zamindar, but was, it was contended, a recognition of all the previously existing rights, and not a grant to the zamindar of those rights for the first time; that this was so was shown by the grant of the sanad of 25th November 1894, by which the then existing arrangements with the non-feudatory Zamindars, of which the plaintiff was one, were confirmed and continued; that if that sanad was based on the Chanda Patent, that form of sanad was never delivered to the plaintiff (the defendant asserts that the intention was to make it applicable to him, but that owing to an oversight such intention was not then carried out); that even if there was an intention to affect, adversely to the plaintiff, the rights and privileges exercised by the plaintiff before 1874, the alteration was therefore never made, the Zamindar of Khariar had no notice of the Chanda Patent and had never acknowledged (as stated by the defendant) that he exercised his rights under it; and that it was not now binding on him. At that time (1874) the Police Act (V of 1861) and the Excise Act (X of 1871) were in force, but the Police and Excise arrangements were still left to the zamindar and there was no indication of any intention of the Government to curtail or withdraw those arrangements which remained in the plaintiff's control until 1892. The plaintiff, therefore, was fully justified in concluding that the rights of Police and Excise administration had been, if not expressly, yet impliedly granted to him, and he was still entitled to

exercise them. Reference was made to Aitchison's Treaties, Vol. III, page 91; and the Special and Local Laws of the Central Provinces by G. J. Nicholls (edition 1874, Nagpur), pages 1, 5, section 20, and page 13.

As to the entries in the *wajib-ul-arz* of 1903 which were objected to, it was contended that the Settlement Officer had no power to make entries in it altering or modifying the rights or privileges of the plaintiff zamindars. The proper function of a Settlement Officer was to make a record-of-rights of the landholders, not to alter or vary their rights which should be effected, if at all, by legislation. Each of the entries in the *wajib-ul-arz* to which objection had been taken by the plaintiff was, it was submitted, an illegal attempt by the Settlement Officer to deprive them of rights and privileges which from time immemorial they had possessed and validly exercised. Reference was made to the Scheduled Districts Act (XIV of 1874); the Central Provinces Land Revenue Act (XVIII of 1881 as amended by Act XVI of 1889), Chapter VI, sections 68, 73, 74, 77, 78 and 79 [Lord Mersey referred to section 77, sub-section (*d*), and section 79, sub-section (*b*)], Fuller's Settlement Code of Laws for the Central Provinces (1903), which, however, did not apply to zamindars (see Introduction, pages i and iv) and contains no rules for them. As to clause 3 of Part I of the *wajib-ul-arz* relating to the "Removal of zamindars and forfeiture of privileges" both Courts below held that it has been rightly deleted, though on behalf of the Secretary of State it was said to be binding on the plaintiff as being substantially a reproduction of clause VII of the Chanda Patent, which the lower Courts found to be inapplicable. To alter or revoke that clause (unless by special legislation) would, as the Judicial Commissioner says in his judgment, be

1912

BIR BIKRAM DEO v. SECRETARY OF STATE FOR INDIA.

illegal. As to clause 6, Part I of the *wajib-ul-arz* relating to ferries and pounds, reference was made to Northern India Ferries Act (XVII of 1878), section 5, and the Cattle Trespass Act (I of 1871), section 18 note; and Act I of 1883, section 23, it being contended that these Acts were not applicable to Khariar, which was a scheduled district, not having been extended by notification. As to forests (clause 7, Part I) Central Provinces Land Revenue Act (XVIII of 1881) section 124A was referred to, and as to minerals (clause 10, Part I) Central Provinces Land Revenue Act (XVIII of 1881) section 151 was cited. As to the powers of the zamindars in the appointment, suspension and removal of Kotwars (clause 7, Part II) section 147A of the same Act rules under which were said to bind the plaintiff. As to all the entries in the *wajib-ul-arz* which were objected to, it was submitted that the plaintiff was not bound by the Acts of the Legislature which were alleged to restrict them; that they were opposed to the letter and spirit of the Land Revenue Act which could not (unless expressly enacted for that purpose and it was submitted it could not be construed in that sense) affect or take away any of the plaintiff's vested rights which had so long been enjoyed by him with the knowledge and acquiescence of the defendant as to amount to a recognition by him of such rights; and that none of them could in any case be taken away without compensation. Clause 3, Part I, and clause 2, Part II of the *wajib-ul-arz* tended to diminish the prestige and honour of the zamindars, and the status to which they were as of right entitled.

Sir Erle Richards, *K.C.*, and *A. M. Dunne*, for the Secretary of State for India, contended that the plaintiff had failed to establish either the status, title or rights on which his claim was based. On the

acquisition of the Garhjat States by the British Government any rights and privileges which the predecessors of the plaintiff enjoyed became dependent upon and subject to the Government and could only be exercised by sufferance and subject to the pleasure of the Government as from time to time declared: see Aitchison's Treaties, volume I, page 435, article 5, and page 437. When the Government determined in 1868 to confer proprietary rights on the zamindars in the Central Provinces such grant was subject to certain conditions and limitations embodied in the Chanda Patent with such modifications as it was found necessary to incorporate in the *wajib-ul-arz* or administration paper of the district, and that those were the terms on which the zamindars held their estates under the Government; and although through an error such modifications were not actually entered at the time, it was understood by the zamindars that they held their estates on such conditions; and that was the case with the plaintiff, the zamindar of Khariar's predecessor in 1874. The conditions and limitations in the Chanda Patent were not repugnant to the sanad of 1874, and none of the clauses were calculated to injure the plaintiff's rights; and the sanad of 1874 recognised nothing that was not in the Chanda Patent as modified by the *wajib-ul-arz* in 1903. The terms and conditions in that *wajib-ul-arz* were fully within the powers and authority of the Government to impose, were not in derogation of any rights of the plaintiff, and were, it was submitted, proper and justified. Clause 3, Part I (as to the removal of zamindars, etc.), was merely an amplification of clause VII of the Chanda Patent and was binding on the plaintiff. The clause relating to ferries and pounds (clause 6 of Part I) was in accordance with the provisions of Act XVII of 1878 and Act III of 1886,

1912

BIR BIKRAM DEO v. SECRETARY OF STATE FOR INDIA.

and the Cattle Trespass Act (I of 1871) by which they were respectively regulated; the pounds having been resumed subject to payment of compensation, and the ferries remaining as the zamindar's private ferries in the manner and subject to the powers of Government provided in the Acts relating thereto. The clauses 7 of Part I and 11, sub-clause 1 of Part II (relating to forests) were binding on the plaintiff both under the Chanda Patent and under section 124A of the Central Provinces Land Revenue Act (XVIII of 1881) [*De Gruyther, K.C.*, referred to section 22 of Act XVI of 1889, under which section 124A was inserted in Act XVIII of 1881]. Clause 10 of Part I (as to minerals) was binding on the plaintiff under the Chanda Patent and section 151 of the Central Provinces Land Revenue Act. Clause 2 of Part II (relating to the discontinuance of nazarana) was introduced in the interest of the zamindars themselves. Clause 7, Part II, was in accordance with section 147 of the Land Revenue Act and the rules made under it and with the *wajib-ul-arz* of 1891 which was duly signed and accepted by the plaintiff. And the whole of the *wajib-ul-arz* of 1903 was in conformity with the Central Provinces Land Revenue Act, and the plaintiff was, it was contended, bound by it. The Settlement Officer had power to make these entries in the *wajib-ul-arz*. This was the subject of issue No. 27, and as to that the District Judge said: "It is contended by the plaintiff that the *wajib-ul-arz* is prepared under section 79 of the Land Revenue Act, and in its preparation the Settlement Officer exceeded his authority. This contention is not correct. The plaintiff wrongly thinks the *wajib-ul-arz* is called a record-of-rights. The *wajib-ul-arz* is called administration paper, and is prepared under section 77 of the Land Revenue Act. The entries made in the *wajib-ul-arz* were also

sanctioned by the Chief Commissioner. The Settlement Officer was, therefore, in making the entries, legally authorized to do so." The Judicial Commissioner also says "that the administration paper and the record-of-rights are not identical." It is doubtful whether there was a *wajib-ul-arz* in 1869, and it was submitted that there was not.

It was also contended that the compensation offered to the plaintiff for loss of revenue enjoyed by him was full and adequate, and the question of its adequacy could not be entertained by a Civil Court; that the suits 27 of 1904 (relating to the resumption of Police and Excise) and 31 of 1905 (relating to the resumption of cattle-pounds) were not maintainable in respect of the matters complained of which were Acts of State ; and that suit 27 of 1904 was barred by limitation.

De Gruyther, *K.C.*, in reply, referred to the directions for Settlement Officers given at page 1 of the introduction to "The Special and Local Law of the Central Provinces" by G. J. Nicholls, section 5, page 46, showing what Settlement Officers have to do: there the record-of-rights appears to be nothing more than the *wajib-ul-arz*. Fuller's Central Provinces Settlement Code was referred to. Usages which existed in ancient times were the basis on which the Chanda Settlement Report by Major L. Smith was drawn up: see section 323. "The effect of the settlement was to make the zamindars proprietors"; "The Special and Local Law of the Central Provinces" by G. J. Nicholls, sections 169 and 359; and Fuller's Central Provinces Settlement Code, section 278, were referred to. The *wajib-ul-arz* sets out all particulars. It was idle to suggest there was not one in 1869.

As to the resumption of cattle-pounds, it was submitted that the Cattle Trespass Act (I of 1871) was

1912

BIR BIKRAM DEO v. SECRETARY OF STATE FOR INDIA.

not applicable: see section 4. The plaintiff's zamindari of Khariar was a scheduled district within Act XIV of 1874, and a notification was necessary to bring the Cattle Trespass Act into force there. [Lord Macnaghten doubted whether a notification was necessary.] The Cattle Trespass Act is applicable to the whole of British India, but a notification is needed to bring it into operation in any district. As to forests, section 124A of the Central Provinces Land Revenue Act, and section 22 of Act XVI of 1889 do not apply at all; there was no record-of-rights, no sanad, and no agreement with Government, the only three cases which render them applicable. The clause might be justified, perhaps, under section 28 or 35 of the Indian Forest Act (VII of 1878), which had not been referred to before. As to the right to minerals (section 151 of the Land Revenne Act), the question is whether a grant of land in general terms carried a right to minerals: it was submitted it did: then if the land was granted, to say the right to minerals cannot be exercised would be confiscation. As to the Excise Act, there was no notification which in a scheduled district is necessary.

The judgment of their Lordships was delivered by

LORD MACNAGHTEN. These are consolidated appeals and cross appeals from judgments and decrees of the Judicial Commissioner of the Central Provinces in part affirming, in part varying, and in part reversing judgments and decrees of the District Judge of Raipur.

The Zamindar of Khariar in the district of Raipur and other Zamindars in that district, proprietors of estates varying in extent and importance, have sued the Secretary of State for India in Council, complaining that they have been illegally deprived of rights to which they were indefeasibly entitled from time

immemorial, and that by the requirement of Government officials they have been compelled to execute *wajib-ul-arz* or administration papers containing provisions in derogation of their undoubted privileges. Their contention is that the provisions of which they complain are illegal and ought to be expunged or annulled, and that the rights, of which as they allege they have been improperly deprived, ought to be restored by the Civil Court.

It was agreed between the parties to this group of litigation that decisions in the suit brought by the Zamindar of Khariar should govern all the rest of the cases.

The status of the Zamindar of Khariar and the plaintiffs in the other suits is simply the status of an ordinary British subject. That matter was determined by the Government in 1864 after an exhaustive enquiry into the position of the petty chiefs of the Central Provinces. A few were recognised as feudatories having some of the attributes of sovereignty. The rest were classed as non-feudatories and declared to be ordinary British subjects.

Before these petty chiefs came under British rule they held their possessions at the will aud pleasure of the ruler for the time being in power. When their country became British territory, whether by conquest and cession as in the case of Khariar and in the case of Bindra Nawagarh in Chattisgarh, or by lapse as in the case of the other Zamindars in Chattisgarh, they were left much in the position they occupied before. The district was wild and for the most part uncultivated, thinly populated, and very difficult of access. They paid to the paramount Government the tribute they had been in the habit of paying to their native rulers, reduced in some cases on account of the poverty of the district. They managed their estates as best

1912

BIR BIKRAM DEO v. SECRETARY OF STATE FOR INDIA.

they could, binding themselves to use rightly the judicial and administrative powers entrusted to them or left in their hands as a matter of convenience or economy of administration. In no case were they recognised as entitled to independent power or as possessing any sovereign rights.

In 1867 the Government determined to confer upon the non-feudatory Zamindars in an adjoining district known as the Chanda District proprietary rights in the soil on certain terms and conditions which were embodied in a document referred to in these proceedings as the Chanda Patent. It was the intention of the Government at that time that sanads should be granted to other non-feudatory Zamindars, in the Central Provinces, including the Raipur Zamindars, framed on the model of the Chanda Patent, with such variations as the circumstances of the case might require. However, it seems that when sanads were issued to the Raipur Zamindars in the year 1874 the matter was overlooked or forgotten, and proprietary rights in the soil were vested in them, expressed in the sanad to be "subject to the payment of such land-revenue and other cesses as may, from time to time, be assessed according to the terms of settlement and to the conditions specified in the Administration paper and other Settlement records." In point of fact these sanads were not accompanied by any Administration papers or any other record. This mistake or omission has given rise to much argument. The Government contended that the plaintiffs had recognised and were bound by the terms of the Chanda Patent. The plaintiffs, while relying on the terms of the Chanda Patent which were to their advantage, maintained that the terms of the Chanda Patent in their entirety, and so far as they tended to their disadvantage, were not binding upon them. In the result both Courts below

have held that the Chanda Patent is not to be treated as embodied in or affecting the sanads granted to the Raipur Zamindars. In this conclusion their Lordships agree. For the purposes of these cases they think that the Chanda Patent may be disregarded.

In 1888 the Government decided that police administration in the non-feudatory zamindaris in the Chattisgarh Division including those belonging to the plaintiffs other than the Zamindars of Khariar and Bindra Nawagarh should be withdrawn from the Zamindars, and that an addition should be made to the *takolis* or revenue payable by the Zamindar when thus relieved of police duties.

In March 1891 the Zamindar of Khariar accepted a fresh assessment of the *takoli* or revenue payable by him to Government under section 54 of the Central Provinces Land Revenue Act (XVIII of 1881), for 11 years from the 1st of July 1890 to the 30th of June 1901, or until a fresh settlement should be made. He then agreed to be bound by all the conditions laid down in the *wajib-ul-arz* of his zamindari, and duly executed that document.

In September 1892 the police administration of the zamindaris of Khariar and Bindra Nawagarh was assumed by the Government, and on that account an addition was made to the *takolis* of the two zamindaris.

In November 1892 a new form of *wajib-ul-arz* applicable to the case of the non-feudatory Zamindars was approved by the Government. It was not, however, brought into use until some years later.

In 1893 the Chief Commissioner, with the sanction of the Government, determined to assume the administration of excise. At the same time it was proposed to pay compensation for loss of income and for the present to farm out to the Zamindars the Excise

1912

BIR RIKRAM DEO v. SECRETARY OF STATE FOR INDIA.

administration, the *takolis* to run with their land settlements.

Some of the Zamindars accepted compensation and took farms of the excise. Some, including the Zamindar of Khariar, and others of the plaintiffs refused both offers.

In May 1903 the Chief Commissioner of the Central Provinces decided to assume the administration of cattle-pounds in the case of the non-feudatory Zamindars in the Chattisgarh Division, including the plaintiffs, paying compensation for the withdrawal of this source of revenue.

In 1903 in connection with the new assessment, the non-feudatory Zamindars in the Chattisgarh Division, including the plaintiffs, were required to execute *wajib-ul-arz* in the form sanctioned by Government in November 1892 with some further amendments.

The proposed *wajib-ul-arz* was executed by the Zamindar of Khariar and the other plaintiffs in compliance with the requirement of the Government. It was however executed under protest. It bears date the 6th of August 1903. After an ineffectual appeal to Government this litigation was commenced.

The principal ground of complaint relates to the withdrawal of police and excise administration. That head of complaint in the case of the Zamindar of Khariar is the subject of suit No. 27 of 1904.

The withdrawal of cattle-pounds is the subject of complaint in suit No. 31 of 1905.

The clauses in the *waiib-ul-arz* of the 6th of August 1903, to which objection is taken, are the subject of suit No. 6 of 1904. One of those clauses deals with cattle-pounds.

Suits No. 6 of 1904 and No. 27 of 1904 were heard together. It was agreed that the decision in those suits should govern the decision in suit No. 31 of 1905

On the 6th of August 1906 the District Judge delivered separate judgments and made separate decrees in the three suits.

In suit No. 27 of 1904, the District Judge held that the Raipur Zamindars in exercising police and excise functions were not acting as of right, but were so acting either by sufferance, or by delegation, and that the resumption of those functions by the Government was a thing done by the Government in exercise of its sovereign powers, and consequently that the suit was not maintainable.

On appeal the Judicial Commissioner held that powers of administration in respect of police and excise must be deemed to have been granted to the plaintiff, and that the plaintiff was entitled to maintain his own police and administer excise in his zamindari.

On this question their Lordships agree with the view of the District Judge.

The District Judge dismissed suit 31 of 1905. The Judicial Commissioner reversed his judgment and made a decree in favour of the plaintiff.

In suit No. 6 of 1904, which relates to the *wajib-ul-arz* of the 6th of August 1903, the following are the clauses objected to:—

In Part I—

"3. Removal of zamindar and forfeiture of privileges.

6. Resumption and management of ferries and pounds.

7. Provision that forest mahals shall be managed in accordance with rules framed by the Chief Commissioner under section 124A, Land Revenue Act.

10. Declaration that all minerals are the property of Government."

In Part II—

"2. Discontinuance of nazarana on grant or renewal of leases.

7. Appointment, suspension, and removal of kotwars (village watchmen) to be governed by rules framed under section 147A, Land Revenue Act.

1912

BIR BIKRAM DEO v. SECRETARY OF STATE FOR INDIA.

11. (1) Forest lands not included in forest mahals to be managed in accordance with any rules made by the Chief Commissioner.

15. Hides and carcasses of dead cattle to be the property of the owners of the cattle."

The District Judge was in favour of the Government on all these questions except Part I, No. 3 and No. 7, and Part II, No. 2.

On appeal to the Judicial Commissioner the decree was varied by adding a direction that the words "and pounds" be deleted from clause 6, Part I, and by substituting the words and figures "clause 3 of Part I" for the words and figures "clauses 3 and 7 of Part I."

On appeal to this Board the objection to Part II, No. 15, was not pressed.

The case was very fully and ably argued; but after carefully considering the arguments adduced, the *wajib-ul-arz* of 1892 and the Acts of the Legislature to which attention was called, their Lordships are of opinion that there is no ground for disturbing the judgment of the Judicial Commissioner in suit 6 of 1904 except as regards cattle-pounds.

Their Lordships are disposed to think that the maintenance of private cattle-pounds is incompatible with the provisions of the Cattle Trespass Act, and they are of opinion that under the circumstances the establishment and maintenance of cattle-pounds under the superintendence and control of Government officials empowered to obtain the assistance of the police when required may be considered essential for the maintenance of law and order, and the peace and good government of the country, and therefore an act of the Executive Government with which it is not competent for the Civil Court to interfere.

Their Lordships will humbly advise His Majesty that in suits 27 of 1904 and 31 of 1905 the decrees of

the Judicial Commissioner should be discharged, and the decrees of the District Judge restored, but without costs. That in suit No. 6 of 1904 the decree of the Judicial Commissioner should be varied by omitting the words "and pounds."

Their Lordships do not think fit to make any order as to costs.

Solicitors for the appellants: *T. L. Wilson & Co.*

Solicitor for the Secretary of State for India in Council: *The Solicitor, India Office.*

J. V. W.

APPELLATE CIVIL

Before Justice Sir Richard Harington and Justice Sir Asutosh Mookerjee.

SARAT CHANDRA GHOSE

v.

SHYAM CHAND SINGH ROY.*

1912

Jan. 11

Lease—Oral agreement to lease—Petition of compromise—Matters extraneous to the suit in which the petition of compromise was filed—Specific performance—Abwab.

By a petition of compromise, which was filed in a previous suit between the parties concerning certain lands, the plaintiffs undertook to recognise the defendant as their tenant in respect of lands not included in that suit, and they further gave up their claim of *selami* for the recognition, on the defendant agreeing to pay an additional sum to what was payable by the original tenant. Upon a suit brought by the plaintiffs for recovery of arrears of rent on the basis of this compromise, defence was that the petition of compromise was not admissible in evidence for want of registration:

* Appeal from Appellate Decree, No. 1372 of 1910, against the decree of Surendra Nath Mitter, Subordinate Judge of Hooghly, dated Feb. 5, 1910, modifying the decree of Sarada Prasad Dutt, Munsif of Serampur, dated July 29, 1909.

1912

SARAT CHANDRA GHOSE v. SHYAM CHAND SINGH ROY.

Held, that although the petition of compromise in so far as it related to properties which were not the subject-matter of the suit in which the decree was made, was not operative to affect such properties, it was admissible in evidence as indicating the existence of an oral agreement to grant a lease, which was specifically enforceable; and the position of the parties was the same, as if a proper document had been executed and registered; and that, therefore, the plaintiff was entitled to a decree.

Birbhadra Rath v. *Kalpataru Panda* (1) and *Gurdeo Singh* v. *Chandrikah Singh* (2) referred to.

The principle of *Walsh* v. *Lonsdale* (3) applied.

Held, further, that the sum agreed to be paid by the defendant being in consideration of the land occupied by him, and also in view of the remission of the *selami*, was not an *abwab*.

APPEAL on behalf of the plaintiffs, Sarat Chandra Ghose and others.

This appeal arose out of an action brought by the plaintiffs to recover arrears of rent from the defendant. It appeared that the plaintiffs previously brought a suit against the defendant in respect of certain lands which did not include the lands for which rent was claimed; and in that suit a petition of compromise was filed by which the plaintiffs undertook to recognise the defendant as their tenant, although they considered that the defendant had purchased only a non-transferable occupancy holding. On the defendant agreeing to pay an additional sum of Re. 1 a year over and above Rs. 5 which was payable by the original tenant, they further agreed to give up their claim for *selami*. The defendant not having paid rent at this rate, the plaintiffs brought the present suit on the basis of the compromise.

Defence was, that the petition of compromise was not admissable in evidence for want of registration, that the rent claimed was not recoverable inasmuch as it contravened provisions of section 29 of the Bengal Tenancy Act, and that it was an *abwab*.

(1) (1905) 1 C. L. J. 388 (2) (1907) I. L. R. 36 Calc. 193.
(3) (1882) 21 Ch. D. 9.

The court of first instance gave effect to the objection raised by the defendant, and decreed the plaintiffs' suit at the rate of Rs. 5 per annum with cesses and costs. An appeal being preferred by the plaintiffs, it was dismissed by the Subordinate Judge. Against this decision the plaintiffs appealed to the High Court.

Babu Jogesh Chandra Roy (Babu Surendra Nath Ghosal with him), for the appellants. The petition of compromise in order to be admissible in evidence does not require registration. It is binding on the parties, although it related to matters extraneous to the suit in which this petition of compromise was filed. It is an agreement to lease, and can be specifically enforced. The case of *Gurdeo Singh* v. *Chandrikah Singh* (1) is distinguishable. The petition of compromise shows that the old tenant held the holding at a yearly rent of 5 rupees; in consideration of the fact that the plaintiffs gave up their claims for *selami* and recognised the defendant as a tenant, the defendant agreed to pay an additional rent of one rupee. This contract is binding on the parties and is enforceable. The additional rent agreed to be paid by the defendant is not in contravention of section 29 of the Bengal Tenancy Act, nor is it an *abwab*.

Babu Surendra Chandra Sen, for the respondent. The petition of compromise is not admissible in evidence, as it is not duly registered; an agricultural lease may no doubt be created by word of mouth, but when it has been reduced into writing it requires to be registered; the compromise, so far as it related to matters beyond the subject-matter of the suit, is only admissible if registered; the settlement of rent is one of the terms of a lease, and therefore the petition of compromise required registration. Moreover, it would appear from

(1) (1907) I. L. R. 36 Calc. 193.

1912

SARAT CHANDRA GHOSE v. SHYAM CHAND SINGH ROY.

the plaint as well as the former realisation of rent that rupees five was considered as rent, and rupee one was considered as in excess of rent; the petition of compromise also shows that rupees five was the former rent and was retained as the rent of the *jama* when the defendant was recognised as a tenant. So the sum of rupee one is an *abwab*. Even if it is conceded that in recognising the defendant as a tenant the rent was increased from rupees five to rupees six, the enhancement should be considered as contravening the provisions of section 29 of the Bengal Tenancy Act; no new tenancy was created, but the old one was recognised as a transferable one and the transfer was considered to be valid, and the transferee was accepted as a tenant in his capacity as a transferee and not as a new tenant.

HARINGTON AND MOOKERJEE JJ. This is an appeal on behalf of the plaintiffs in an action for rent. The sole point in controversy between the parties is, whether rent is payable at the rate of Rs. 6 a year as alleged by the plaintiffs, or Rs. 5 a year as alleged by the defendant.

The defendant purchased the holding in 1895 from the original tenant. In 1906, in the course of another litigation between the present parties, which did not include the property now in dispute, a petition of compromise was filed. By that compromise the plaintiffs undertook to recognise the defendant as their tenant, although in their view he had purchased a non-transferable occupancy holding. The plaintiffs further gave up their claim to payment of *selami* for the recognition; but it was mutually agreed that in addition to Rs. 5, which was the rent payable by the original tenant, the defendant should pay an additional sum of Re. 1 a year. The plaintiffs now seek to recover rent

from the defendant on this footing. His answer is threefold: *first*, that the petition of compromise is not admissible in evidence, because it was not duly registered; *secondly*, that, if it is admissible in evidence, the additional sum agreed to be paid by him is in the nature of enhanced rent in contravention of the provisions of section 29 of the Bengal Tenancy Act; and, *thirdly*, that the agreement is, in any view, for payment of an *abwab*. In our opinion, none of these contentions can possibly prevail.

In so far as the first point is concerned, it may be conceded that, as laid down in the cases of *Birbhadra Rath* v. *Kalpataru Panda* (1) and *Gurdeo Singh* v. *Chandrikah Singh* (2), a consent decree, in so far as it relates to properties which are not the subject-matter of the suit in which the decree is made, is not operative to affect such properties. Consequently the plaintiffs can rely only upon the petition of compromise. From this point of view it has been argued that, treated as a lease, the petition of compromise was compulsorily registrable under clause (*d*) of section 17 of the Indian Registration Act. But this objection must be overruled on the ground that the petition is admissible as indicating the existence of an oral agreement to grant the lease. That oral agreement plainly is still specifically enforceable. Consequently, the position of the parties is the same as if the proper document had been executed and registered. In support of this view, we need only refer to the cases of *Bibi Jawahir Kumari* v. *Chatterput Singh* (3) and *Singheeram Poddar* v. *Bhagbat Chander Nundi* (4) where the principle laid down by Sir George Jessel in the case of *Walsh* v. *Lonsdale*(5) was applied.

(1) (1905) 1 C. L. J. 388.
(2) (1907) I. L. R. 36 Calc. 193.
(3) (1905) 2 C. L. J. 343.
(4) (1910) 11 C. L. J. 543.
(5) (1882) 21 Ch. D. 9.

1912

SARAT CHANDRA GHOSE v. SHYAM CHAND SINGH ROY.

Consequently, we must proceed on the assumption that the defendant was recognised as a tenant, and that he undertook to pay Rs. 6 a year to the plaintiffs in consideration of the land claimed by him by purchase.

The second question which requires consideration is, whether this agreement was in contravention of the provisions of section 29 of the Bengal Tenancy Act. The learned vakil for the respondent has contended that this was an agreement by which his money-rent as an occupancy raiyat was enhanced by contract to the extent of more than two annas in the rupee. This argument is obviously fallacious. The answer is that the land in question was non-transferable, and therefore the defendant was not an occupancy raiyat. Consequently, there was no rent payable by him which was enhanced.

The third question is whether the sum agreed to be paid is an *abwab*. This argument is ingenious, but clearly unsound. The sum was agreed to be paid in consideration of the land occupied by the defendant, and also in view of the remission of the *selami* which would otherwise have been payable. It cannot consequently be deemed in any sense an illegal cess.

The result is that this appeal is allowed, and the decree of the Court below varied. A decree will be made in favour of the plaintiffs at the rate of Rs. 6. The appellants are entitled to their costs both here and in the Court of Appeal below.

S. C. G.

Appeal allowed.

ORIGINAL CIVIL.

Before Mr. Justice Chitty.

1912

Feb. 13.

THE BOMBAY COMPANY, LD.

v.

THE NATIONAL JUTE MILLS CO., LD.*

Stamp-duty—Bought and Sold Notes—Stamp Act (II of 1899), ss. 5, 6 and 36, Sch. I, Arts. 5 and 43—Arbitration—Admission, by arbitrators, of document not duly stamped, effect of—Bengal Chamber of Commerce, arbitration by—Rules relating to—Umpire, omission to nominate, effect of—Disclosure of names of arbitrators if contemplated by the rules—Reference, provision for appearance of parties on.

A contract for or relating to the sale of goods comprised in bought and sold notes, which contain a provision to refer disputes to arbitration, is chargeable with a stamp duty of two annas on each broker's note under Art. 43 of the Stamp Act, and not with a duty of eight annas as an agreement.

Kyd v. *Mahomed* (1) followed.

If a document, which is not duly stamped, were admitted in evidence by arbitrators on a reference, the provisions of section 36 of the Stamp Act would prevent such admission being called into question at any stage of the same suit or proceeding except as provided in section 61, and an application to file the award of the arbitrators would be a "stage of the same proceeding."

The arbitration rules of the Bengal Chamber of Commerce, grammatically speaking, require an umpire to be nominated before the arbitrators enter upon the reference, but the omission to so nominate an umpire would not be a ground for setting aside or varying the award having regard to the provisions of rule VI (*o*).

The arbitration rules of the Bengal Chamber of Commerce (rule X) contemplate that the names of the arbitrators shall not be disclosed to the parties.

* Application in Original Civil Suit No. 23 of 1912.

(1) (1891) I. L. R. 15 Mad. 150.

1912

THE BOMBAY CO., LD. v. THE NATIONAL JUTE MILLS CO., LD.

Chooni Lall v. *Madhoram* (1) and *Hurdwary Mull* v. *Ahmed Musaji Selaji* (2) dissented from.

Rule VI (*g*) provides that the parties shall not, without the express permission of the arbitrators, be entitled to appear. The parties have no right to appear, or even to ask for such permission.

MOTION.

This was an application made by the petitioner, the Bombay Company, Limited, under section 15 of the Arbitration Act, 1899, for an order that an award made in its favour by the Tribunal of the Bengal Chamber of Commerce under the rules of the Chamber relating to arbitrations may be filed in Court under the provisions of the Indian Arbitration Act, 1899, and judgment pronounced according to the award, and that the National Mills pay the amount ordered to be paid by the award.

The facts leading up to the application were as follows:—By a contract dated the 1st December 1910 the Bombay Company, Limited, bought and the National Jute Mills, Limited sold 15,000 A twill bags of the National Mills standard make in 50 bales of 300 pieces each at Rs. 31 per hundred bags F. A. V. in the port of Calcutta. The contract was evidenced by the usual bought and sold notes known as Form A of the Indian Jute Manufacturer's Association. The bought and sold notes bore a stamp of two annas each, and contained the following clause relating to arbitration:—"Any dispute whatever arising on or out of this contract shall be referred to arbitration under the rules of the Bengal Chamber of Commerce applicable for the time being for decision, and such decision shall be accepted as final and binding on both parties to this contract. The award may, at the instance of either party and without any notice to the other of them, be made a rule of the High Court of Judicature at Fort William in Bengal."

(1) (1908) I. L. R. 36 Calc. 388; 13 C. W. N. 297.

(2) (1908) 13 C. W. N. 63.

The goods were in due course shipped to Delagoa Bay, and some of the bales were despatched to various places in South Africa, while the rest remained unsold at Delagoa Bay. It was subsequently ascertained that the contents of all the bales were rotten and unmerchantable, and seven bales were re-shipped to Calcutta. The Bombay Company, Limited, made a claim for damages on the National Mills which was resisted, and then claimed an arbitration under the terms of the contract. Two arbitrators whose names were not disclosed were accordingly appointed by the Registrar of the Tribunal of the Bengal Chamber of Commerce under the rules of the Chamber. No umpire was appointed, and no time or place was appointed for the hearing of the reference; but the Registrar on the 15th August 1911 invited the National Mills to submit a written statement of their case, and stated that he was constituting a Court to adjudicate on the dispute. On the 31st August 1911 the arbitrators made an award ordering the National Mills to pay Rs. 7,627-15 and the costs of the arbitration, and to take back the seven bales which had been re-shipped to Calcutta, and declaring that the remaining 43 bales in South Africa were for the account and at the risk of the National Mills. The seven bales were returned to the National Mills, but they refused to accept the award, and the petitioner thereupon made the present application. The grounds on which the validity of award was challenged appear from the arguments and judgment.

The rules of the Tribunal of Arbitration of the Bengal Chamber of Commerce, so far as are material to the present application, were as follows:—

"VI. That in every case where a dispute has arisen in relation to a contract which provides for a decision thereof by the Tribunal, an application shall be addressed by either party to the Registrar who on receipt of such application shall constitute a Court by nominating in writting two or

1912

THE BOMBAY CO., LD. v. THE NATIONAL JUTE MILLS CO., LD.

more arbitrators, and also, in case of need, an umpire, or if both parties in and by such application so desire, a single arbitrator to adjudicate on the dispute. . . . The arbitration shall then be conducted in accordance with the following rules, with which are incorporated, where not expressly or impliedly provided to the contrary, the provisions of the Indian Arbitration Act.

"(*e*) The parties to the reference and all persons claiming through them respectively shall, subject to the provisions of any law for the time being in force . . . . produce before the arbitrators all books, deeds, papers accounts, writings and documents within their possession or power respectively, which may be required or called for, and do all other things which during the proceedings on the reference, the arbitrators may require . . .

"(*f*) The arbitrators shall have power to appoint a time and place for the hearing of references, and within seven days of notice on that behalf the parties shall prepare and submit to the Registrar a written statement with regard to the matter in dispute or difference.

"(*g*) No party to a reference shall without express permission of the arbitrators be entitled to appear in person or by counsel, attorney or other advocate or adviser before the arbitrators, or insist on or require the arbitrators to hear or examine witnesses or receive oral or documentary evidence, but the arbitrators at discretion may, through the Registrar, require the parties, with or without witnesses, to attend before them or any Committee or Sub-Committee of the Chamber to be examined on or without oath or solemn affirmation.

"(*l*) The arbitrators shall make their award in writing within 14 days after entering on the reference or on or before any later day to which the arbitrators by any writing signed by them may, from time to time, enlarge the time for making the award.

"(*m*) If the arbitrators have . . . signified to the Registrar or to the Umpire that they cannot agree, the Umpire may forthwith enter upon the reference . . .

"(*o*) No award shall be set aside or varied or attempted to be set aside or varied by reason or on account of any informality, omission or delay or error of the proceedings in or about the same or in relation thereto, or on any other ground or for any misconduct short of collusion or fraud on the part of the arbitrators.

"(*q*) The Indian Arbitration Act, 1899, so far as the provisions thereof are not inconsistent with these rules, shall apply to all references to the Tribunal.

"X. . . . When completed a copy of the award shall be sentby the Registrar to each of the parties, but the names of the arbitrators shall not ordinarily be disclosed, and such non-disclosure shall not affect the award."

1912

THE BOMBAY CO., LD. v. THE NATIONAL JUTE MILLS CO., LD.

Mr. S. P. Sinha (with him *Mr. W. Gregory*), for the National Jute Mills Co., Ld. The bought and sold notes are insufficiently stamped. As brokers' notes they come within article 43 of the Stamp Act which requires a stamp of two annas. They also come within article 5, as they contain an agreement to refer to arbitration. Such agreements have been held to come within article 5 as being agreements not otherwise provided for, and to be chargeable with a stamp of eight annas. The notes therefore either relate to several distinct matters and are under section 5 chargeable with the aggregate amount of the duties, or are so framed as to come within two or more descriptions in Schedule, I and are under section 6 chargeable with the highest duty where the duties are different. The notes are therefore not sufficiently stamped, and the arbitrators have acted under an invalid submission: *Hardwary Mull* v. *Ahmed Musaji Selaji* (1).

Under the rules of the Chamber of Commerce the names of the arbitrators should be notified to the parties, and a time and place appointed for the hearing of the reference, and non-compliance with these rules constitutes legal misconduct and renders the award invalid and unenforceable: *Hurdwary Mull* v. *Ahmed Musaji Selaji* (1). Moreover, the rules of the Chamber contemplate the appointment of an umpire before the arbitrators enter upon the reference. Such appointment is a condition precedent to the arbitrators entering upon the reference, and where it is not made, the reference cannot proceed: *Chooni Lall* v. *Madhoram* (2). The award is therefore invalid and unenforceable, and should not be filed.

Mr. W. H. Knight (with him *Mr. L. P. Pugh*), for the petitioner, the Bombay Company, Limited. It is

(1) (1908) 13 C. W. N., 63.

(2) (1908) I. L. R. 36 Calc. 388; 13 C. W. N. 297.

1912

THE BOMBAY CO., LD. v. THE NATIONAL JUTE MILLS CO., LD.

submitted that the decision in *Hardwary Mull* v. *Ahmed Musaji Selaii* (1) is wrong. Section 5 of the Stamp Act has no application, as the agreement to refer to arbitration is merely a part of the contract as contained in the brokers' notes, and is not a "distinct matter" within the meaning of section 5. Neither has section 6 any application, because such an agreement does not come within two or more articles, but comes solely within article 43. It is excluded from the operation of article 5(*b*) by Exemption (*a*) of that article: *Kyd* v. *Mahomed* (2). Moreover, the agreement has already been admitted in evidence by the arbitrators, and section 36 of the Stamp Act prevents such admission being called into question at this stage.

It is also submitted that the decision in *Chooni Lall* v. *Madhoram* (3) is wrong. Rule VI of the rules of the Chamber does not make the nominating of an Umpire by the Registrar a condition precedent to the arbitrators entering upon the reference. It merely provides for the nominating of an Umpire "in case of need," and as the arbitrators have agreed upon their award, there has been no need for an Umpire. Moreover, under Rule VI (*o*) it is provided that no award shall be set aside or varied or attempted to be set aside or varied by reason of any informality, omission or error in the proceedings, or on any ground short of collusion or fraud on the part of the arbitrators.

It is not necessary under the rules that the names of the arbitrators should be disclosed, because Rule X specifically provides that the names of the arbitrators shall not ordinarily be disclosed, and such non-disclosure shall not affect the award. Rule VI(*g*) does not

(1) (1908) 13 C. W. N. 63.
(2) (1891) I. L. R. 15 Mad. 150.
(3) (1908) I. L. R. 36 Calc. 388; 13 C. W. N. 297.

give the parties a right to appear with the permission of the arbitrators, but says that they shall not be entitled to appear without the express permission of the arbitrators, and shall not insist on or require the arbitrators to hear witnesses or receive evidence.

It is submitted that the rules of the Chamber have been complied with and the proceedings regularly conducted, and that the award should be filed.

Cur. adv. vult.

CHITTY J. This is a petition by the Bombay Company, Limited, that an award made in their favour under the rules of the Bengal Chamber of Commerce relating to arbitrations may be filed in Court under section 15 of the Indian Arbitration Act (IX of 1899). The application is opposed by the National Jute Mills Company, Limited, who were the other party to the arbitration proceedings. There is no dispute as to the facts. By a contract, dated 1st December 1910, the Bombay Company agreed to buy from the National Jute Mills Company 15,000 A twill bags of National Mills, standard make, in 50 bales of 300 pieces each. The goods were for export to South Africa. They were duly shipped and taken to Delagoa Bay. Some of the bales (the petitioners allege) were despatched to various places in South Africa, while other bales remained unsold at Delagoa Bay. It is said that all the bales were in bad condition, and, though externally perfect, the contents were rotten and unmerchantable. Seven bales were returned to Calcutta. The Bombay Company made a claim on the National Jute Mills Company which they declined to pay. The Bombay Company claimed an arbitration. Two arbitrators were appointed by the Registrar under the rules, who on 31st August 1911 made the award now before the Court. The National Jute Mills Company refused to

1912

THE BOMBAY CO., LD. v. THE NATIONAL JUTE MILLS CO., LD.

CHITTY J.

accept that award, and have in this Court raised certain objections as to its legality. I cannot, of course, go into the merits of the case; but before going into the objections raised, I should dispose of one point raised by the petitioners' Counsel. It is stated in the petition, and it is the fact, that the arbitrators ordered the National Jute Mills Company to take back the seven bales returned to Calcutta, and they were taken back. It is argued that this amounted to an acceptance of the award by the National Jute Mills Company. That is a question of intention, and I may say at once that the National Jute Mills Company never intended thereby to accept the award, nor did the Bombay Company consider that they had done so. If they did, it must surely have been mentioned in the petition. The National Jute Mills Company were throughout, from the date of the award, objecting to it.

The legal objections raised in this Court are these: It is said (i) that the submission to arbitration not bearing an agreement stamp of eight annas, the submission was invalid, and the arbitrators had no jurisdiction to enter upon the reference; (ii) that the constitution of the Court, by the nomination not only of two arbitrators but also of an Umpire, was necessary before the arbitrators could legally adjudicate between the parties; in other words the appointment of an Umpire was a condition precedent to the arbitrators entering upon the reference, and (iii) that the names of the arbitrators not being disclosed, there was no opportunity given to the parties to apply for permission to appear before them under Rule VI (*g*); that no time and place of hearing was fixed; and that the written statement was called for before the Tribunal was constituted; and that these things amounted to legal misconduct on the part of the arbitrators. Reliance has been placed by the opposite party on two cases decided by this

1912

THE BOMBAY CO., LD. v. THE NATIONAL JUTE MILLS CO., LD.

CHITTY J.

Court: *Hurdwary Mull* v. *Ahmed Musaji Selaji* (1), and *Chooni Lal* v. *Madhoram* (2). If those decisions be accepted as correct, they dispose of the present petitioners' case. But as they are the decisions of a single Judge of co-ordinate powers, while according to them all due weight and respect, I am not debarred from arriving at, and expressing my own conclusions. Indeed, I am bound to do so.

First, with regard to the question of stamp, the same objection was taken in *Hurdwary Mull's Case* (1), and the learned Judge stated that he saw no way out of the difficulty; but if it were the only objection, he thought that the Court could remit the matter to the arbitrators. Now the contract in this case, as in that, is comprised in bought and sold notes, each signed by the brokers and stamped under Article 43 of Schedule I to the Stamp Act with a stamp of two annas. This contract contains a number of printed clauses or conditions, the last of which (clause 12) constitutes the submission to arbitration. The petitioners' Counsel made some attempt to argue that the real contract to refer was contained in the subsequent letters of the parties, with a view to applying the ruling of the Bombay High Court in the case of *Gangaram Kushaba Rangole* v. *Narayan Babaji Rangole* (3), but this was clearly not the case. In my opinion however the agreement to refer any dispute whatever arising out of the contract to arbitration is a part of the contract itself, and not a "distinct matter" within the meaning of section 5 of the Stamp Act. If this be so, the whole contract clearly falls under the exemption clause (*a*) to Article 5, as being an agreement or memorandum of agreement for or relating to the sale of goods or merchandise exclusively. The only exception

(1) (1908) 13 C. W. N. 63. (2) (1908) I. L. R. 36 Calc. 388.
(3) (1893) I. L. R. 19 Bom. 32.

1912

THE BOMBAY CO., LD. v. THE NATIONAL JUTE MILLS CO., LD.

CHITTY J.

to that exemption is where the contract is also a note or memorandum chargeable under Article 43. This contract is contained in such notes or memoranda, and these are duly stamped. This view of the matter does not appear to have been before the mind of the learned Judge in *Hurdwary Mull's Case* (1), but it is the view taken by the Madras High Court: see *Kyd* v. *Mahomed* (2). I may say that in the many hundreds of similar contracts which have come before the Courts I have never seen one that bore a stamp of 8 annas as "a submission," nor have I ever till now heard it suggested that it was so chargeable. I hold, therefore, that the documents together making the contract were not chargeable with duty otherwise than as broker's notes.

If they were so chargeable, I am of opinion that section 36 of the Stamp Act would prevent the objection from being taken at this stage. These documents were admitted and acted upon by the arbitrators, and that admission cannot now be called in question except under section 61. It was argued by Counsel for the opposite party that this was not a part of "the same proceeding," but I think it may be said to be so, bearing an analogy to an application for execution of a decree. The sections of the Arbitration Act lead on by natural sequence from the submission referred to in section 5 to the filing of the award in section 15.

The next question is as to the appointment of the umpire being a condition precedent to the arbitrators entering upon the reference. I agree with the view expressed in *Chooni Lal's Case* (3) that, grammatically speaking, Rule VI requires the Registrar *upon the receipt of the application* of either party to proceed

(1) (1908) 13 C. W. N. 63. (2) (1891) I. L. R. 15 Mad. 150.
(3) (1908) I. L. R. 36 Calc. 388; 13 C. W. N. 297.

to constitute a Court consisting of two or more arbitrators, and also, in the case of need, an Umpire to adjudicate on the dispute; and I further agree that the words "in case of need" probably refer to cases where an Umpire may be necessary, *i.e.*, in cases where any even number of arbitrators are nominated, although this is not absolutely clear. On the other hand, the fact that by Rule VI(*m*) the arbitrators may signify to the Registrar *or* to the Umpire that they cannot agree, seems to point to the possibility of their being no Umpire at that stage, or to his name not being disclosed to the arbitrators.

The necessity which usually arises for arbitrators to nominate an Umpire to adjudicate in the event of their disagreement *before* entering upon the reference does not exist in arbitrations under the Bengal Chamber of Commerce rules. Ordinarily it would be difficult, if not impossible, for arbitrators nominated by the parties themselves, who have disagreed on the matters referred, to agree upon a person whose umpirage they could accept. This is why the condition of nomination before entering on the reference is so frequently inserted in agreements to refer. In arbitrations under these rules it is the Registrar who nominates both arbitrators and Umpire, and generally acts as go-between between the Tribunal on the one side and the parties on the other. It may be noted that by Provision II of Schedule I to the Arbitration Act two arbitrators may appoint an Umpire at any time within the period during which they have power to make an award. By Rule VI(*q*) the Act, so far as its provisions are not inconsistent with the rules, applies to all references to the Tribunal. It must be clear, therefore, that the rules strictly require the Umpire to be nominated before the arbitrators enter upon the reference. They certainly do not do so in such clear and

1912

THE BOMBAY CO., LD. v. THE NATIONAL JUTE MILLS CO., LD.

CHITTY J.

unmistakeable terms as appear in the case of *Bright* v. *Durnell* (1), and that in my opinion is sufficient to distinguish that case from the present. The case of *Bates* v. *Townley* (2) does not appear to have any direct bearing on the present question. There the reference was not to two arbitrators, who were to appoint an Umpire, but to three arbitrators, one chosen by either party, and a third to be chosen by the other two. Obviously the reference could not proceed until the third arbitrator was chosen and the Tribunal was thus complete. The answer, however, to the objection seems to me to be found in Rule VI(*o*). The Court will, I take it, be averse to setting aside, or pronouncing as illegal, the proceedings of a Tribunal selected by the parties themselves. It certainly should not do so on technical grounds. Here it is conceded that the arbitrators have agreed upon their award. There has therefore been no necessity for the intervention of an Umpire. If one had been nominated, the parties would be in the same position. No further reference could have been made by either side to obtain the Umpire's opinion, or to question the correctness of the arbitrators' award. It may be said, as was said in *Hurdwary Mull's Case* (3) that this is not an application to set aside the award. That is true, but Rule VI(*o*) does not refer to formal applications made in this Court, but deals in plain English with the attempts of dissatisfied parties to avoid their obligations under the award of the Tribunal. It says: "No award shall be set aside or varied or attempted to be set aside or varied by reason or on account of any informality, omission, or delay or error of the proceedings in or about the same or in relation there to, or on any other grounds, or for any misconduct short of collusion or fraud on the part

(1) (1836) 4 Dowl. 756. (2) (1847) 1 Exch. 572.
(3) (1908) 13 C. W. N. 63.

of the arbitrators." This appears to me to be an informality or omission which ought not to be allowed to vitiate the proceedings.

The third objection also appears to me to be untenable. The fact that the names of the arbitrators were not disclosed to the parties is a state of things contemplated by the rules—See rule X "The names of the arbitrators shall not ordinarily be disclosed and such non-disclosure shall not affect the award." Rule VI (*g*) does not in my opinion provide that parties may with the express permission of the arbitrators appear before them; but the converse, namely, that they shall not without the express permission of the arbitrators be entitled to appear. The distinction is important. The arbitrators may if they please invite or permit the parties to appear, but the invitation or permission must come from them; the parties are not entitled to appear or even to ask for such permission So in the next sentence the parties shall not insist or *require* the arbitrators to hear or receive evidence. The word "hearing" in Rule IV and Rule VI *(f)* does not mean more than the consideration by the arbitrators of the matters referred. Notice has to be given by the Registrar to the parties so that they may be able to submit their written statements in time. This was done in the present case. On 15th August 1911, the Registrar called upon the National Jute Mills Company to submit their statement. This was complied with by the managing agents, Messrs. Andrew Yule and Company, by their letter of 21st August. On 22nd August the Registrar sent them the statement and papers submitted by the Bombay Company for any further remarks they might have to make. These were returned the same day without comment. The present complaint of the National Jute Mills Company that they were not heard upon the reference, appears

1912

THE BOMBAY CO., LD. v. THE NATIONAL JUTE MILLS CO., LD.

CHITTY J.

to me to be without foundation. It is immaterial that the Registrar called upon the parties for their statements before the arbitrators were nominated, or at least had consented to act. It was always open to the arbitrators to require the parties to supply further information, written or verbal. For these reasons I am of opinion that the petitioners are entitled to the order prayed for, and the award must be filed. The National Jute Mills Company must pay to the Bombay Company their costs of this application.

C. B.

Rule absolute.

CRIMINAL REVISION.

Before Mr. Justice Holmwood and Mr. Justice Sharfuddin.

1912

Feb. 8

SEW KARAN

v.

CORPORATION OF CALCUTTA.*

Adulteration—Adulterated ghee, sale of—Master and servant—Sale by servant or partner—Liability therefor of master or co-partner of a firm of Commission Agents—Calcutta Municipal Act (Beng. III of 1899), ss. 494 and 574.

Section 495 of the Calcutta Municipal Act imposes a positive prohibition against the sale of adulterated articles of food or drink, and covers the case of an agent or firm as well as that of a master and servant.

A master is liable under the section for the sale by his servant of such as adulterated articles at his shop without his connivance. The partners of a firm carrying on business as agents of the manufacturers of *ghee*, in shops bearing their names, are each responsible for everything sold therein in contravention of the section.

Brown v. *Foot* (1), followed.

* Criminal Revision Nos. 29 and 30 of 1912 against the orders of Amrita Lal Mukerjee, Municipal Magistrate of Calcutta, dated Nov. 13, 1911.

(1) (1892) 17 Cox C.C. 509.

1912

SEW KARAN v. CORPORATION OF CALCUTTA.

ON 23rd September 1911 an application for summons was filed on behalf of the Corporation of Calcutta, before the Municipal Magistrate, against the petitioner and one Lalchand, under sections 495 and 574 of the Calcutta Municipal Act (Beng. III of 1899), for selling a quantity of buffalo *ghee* adulterated with 10 per cent. of foreign fat. It appeared that, on the 31st August, Dr. Sen, Food Inspector of the Corporation, purchased 4½ annas worth of buffalo *ghee* at the petitioners' shop, No. 2, Ram Kumar Rokhit's Lane, in the town of Calcutta. He divided the quantity purchased into three parts, each of which he bottled, labelled and sealed. He delivered a bottle to Lalchand as counter sample, forwarded another to Dr. Ghose, the Analyist of the Corporation, and kept the third himself. Dr. Ghose found the sample sent him to contain 10 per cent. of foreign fat, but Dr. Briggs, who analyzed the counter sample, was of opinion that it was adultered with *til* seed oil to the extent of 8 to 10 per cent.

The petitioner, Sew Karan, was said to be a commission agent for certain manufacturers of *ghee* upcountry, which was sold at certain shops bearing the names of Lalchand Sew Karan, in Ram Kumar Rokhit's Lane. The *ghee* in question was actually sold to the Food Inspector by Lalchand himself, whom the Magistrate treated as the servant of the petitioner. Lalchand did not appear, but the petitioner did and was tried and convicted, under the above sections, on the 13th November, and fined Rs. 100. There was another similar conviction against him in respect of *ghee* sold at another shop bearing the same names. He thereupon moved the High Court and obtained the present two Rules in identical terms, as set forth in the judgment of the High Court.

1912

SEW KARAN v. CORPORATION OF CALCUTTA.

The Standing Counsel (*Mr. B. C. Mitter*) (with him *Babu Debendra Chunder Mullick*), for the Corporation, showed cause. As to the second part of the Rule which relates to the liability of a master for the acts of his servant, see the Sale of Foods and Drugs Act (38 and 39 Vict. c. 63) s. 5, the provisions of which are substantially the same as those of section 495 of the Calcutta Municipal Act. The section contains an absolute prohibition irrespective of the person who sells the adulterated article. The master is liable for the act of the servant: *Brown* v. *Foot* (1). As to whether the fact of the petitioner being a commission agent alters his position in this respect, the answer is in the negative: see *Ireland* v. *Livingstone* (2).

Mr. K. N. Chaudhuri (with him *Babu Debendra Narain Bhattacharjee*), for the petitioners. In view of the ruling in *Brown* v. *Foot* (1), I cannot contend that master is not so liable, but the real question is as to what Lalchand was. The license of the shop, in the names of Lalchand Sew Karan, shows that the former was a partner. A prosecution against one of the partners is not maintainable: *Pearks, Gunston & Tee* v. *Ward* (3). The case being a criminal one, the principle of civil liability should not be extended to it.

HOLMWOOD AND SHARFUDDIN JJ. These were two Rules calling upon the Municipal Magistrate of Calcutta and the Chairman to show cause why the conviction and sentence passed upon Sew Karan, proprietor, should not be set aside on the ground that he did not sell, or cannot be said to have sold, the *ghee* himself, and to determine whether section 495 of the Calcutta Municipal Act applies to any person other than the actual hand employed in the sale.

(1) (1892) 17 Cox C.C. 509. (2) (1871) L. R. 5 H. L. 395, 408.
(3) [1902] 2 K. B. 1.

Now, as regards the first question, we can have no doubt, on the authority of *Brown* v. Foot (1), that on the law, which in England is exactly the same as in this country, indeed, section 495 appears to have been based entirely on section 6 of the English Act, it has been held that a servant, employed by his master to sell any article, who adulterates it, thereby renders his master liable under the section, although there is no connivance of the master; and non-connivance of the master is no defence, though the entire absence of connivance on his part might in the discretion of the convicting Magistrate be a ground for mitigation of the penalty. Now, the ground upon which Mr. Justice Wills proceeds in that case is one which equally covers the case of an agent or a firm, because it is not directed as a prohibition against a person, but, as Wills J. says, it imposes a positive prohibition against the sale of adulterated articles. This was the point upon which we had doubt when we issued the Rule, owing to the wording of the law both in England and in India, the section saying "no person shall sell." But it appears to be settled law that the prohibition is positive, as we have seen, against the sale of adulterated articles, and any person who is legally responsible for such a sale comes within the section.

But it has been argued that this Sew Karan is only a commission agent for certain producers of *ghee* up-country, that he collects *ghee* and other things from them and, as they sell in Calcutta at certain shops which go in the names of Lalchand Sew Karan, the Health Officer appears to have taken proceedings against Lalchand Sew Karan, and we see that the licensee for wholesale dealers in *ghee* at No. 2, Ram Kamar Rakhit's Lane and for selling *ghee* at No. 9. Ram Kumar Rakhit's Lane is Lalchand Sew Karan.

(1) (1892) 17 Cox C.C. 509.

1912

SEW KARAN v. CORPORATION OF CALCUTTA.

The Magistrate, however, treated the case as if Lal chand was the servant of Sew Karan, and the finding on the evidence is that Lalchand was the hand that actually sold the *ghee* to the Inspector. On the view we take of the law, if Lalchand and Sew Karan are partners, they are both responsible for everything which is sold in their name at shops bearing both their names; and if they are master and servant, it is clear on the English authorities that the master is liable for the act of his servant.

We do not think it necessary to go further into the question of what their precise relations are. It is sufficient to say that Lalchand did not appear in the lower Court, and that the conviction in both the cases has been held against Sew Karan.

There are two matters in the Act itself which convince us that the Legislature intended that the beneficial owner of the article should be responsible for its purity. For, when the Health Officer goes to make enquiries about food exposed for sale, there is the provision in section 507 that he can compel the seller to give him enough as is reasonably requisite for analysis, and that this quantity shall be divided into three parts to be then and there separated, and the Chairman forthwith will notify to the seller or his agent selling the article his intention to have the same analysed. Now, it is clear that in this passage the word "seller" means the owner of the shop or the person who has license to sell goods or who carries on business through his servant or agent, and he is contrasted with the agent actually selling the article. This is one point which convinces us of the intention of the Legislature. Then we turn to the condition of punishment under section 574. We find that the fine which may be imposed is Rs. 100 for the

first offence and Rs. 500 for any subsequent offences. Now, it is perfectly clear that this must have reference to the master and not to the servant, because it would not be always the same servant who would be in the shop selling articles, and by changing his servant every week a dishonest proprietor could continue to sell adulterated goods without incurring any further penalty.

We, therefore, think, taking the view that the Magistrate took, that Lalchand was the seller or agent, and Sew Karan the owner or principal, that the convictions are right; or taking the view which has been urged upon us by the learned counsel for the defence, who obtained the Rule, that they were partners, the convictions will be equally right.

The Rules are, therefore, discharged.

E. H. M. *Rules discharged.*

CIVIL RULE.

Before Justice Sir Cecil Brett and Mr. Justice Carnduff.

SURENDRA MOHINI DEBI

v.

AMARESH CHANDRA CHATTERJEE.*

1912

Feb. 22

Second appeal—Sale, application for confirmation of, by auction-purchaser against judgment-debtor, under s. 312 of the Code—Auction-purchaser, if a necessary party in a proceeding under s. 311 of the Code—Civil Procedure Code (XIV of 1882), ss. 311, 312.

No second appeal lies against an order refusing an application by the auction-purchaser against the judgment-debtor, for confirmation of sale,

* Civil Rule, No. 4178 of 1909, against the order of H. E. Ransom, District Judge of Nadia, dated July 29, 1909, confirming the order of Tarapada Chattopadhya, Munsif of Nadia, dated March 15, 1909.

1912

SURENDRA MOHINI DEBI v. AMARESH CHANDRA CHATTERJEE.

under s. 312 of the Code of Civil Procedure, 1882, inasmuch as such a case between the auction-purchaser and the judgment-debtor cannot be regarded as a proceeding between the parties to the suit or their representatives under s. 244 of the Code.

The auction-purchaser is not a necessary party to an application under s. 311 of the Code.

Karamat Khan v. *Mir Ali Ahmed* (1) not followed.

Ali Gauhar Khan v. *Bansidhar* (2) distinguished.

RULE obtained by Surendra Mohini Debi, the auction-purchaser.

One Shib Coomaree Debi, who is one of the opposite party in this rule, obtained an *ex parte* decree in respect of a *dur-putni* tenure. The *dur-putni* was sold on the 12th June 1907. On the 31st July 1907 some of the judgment-debtors applied for setting aside the sale. The sale was set aside on the 4th January 1908 on compromise. On the 27th March 1908, the auction-purchaser applied for confirmation of sale and grant of sale-certificate under s. 312 of the Code. The auction-purchaser lost in the Courts below. The judgment of the District Judge, which is appealed against, and against which this Rule was issued, ran as follows:—

"The sale having in fact been set aside, no order can be passed confirming the sale. Appellant, the auction-purchaser, was not a party to the proceedings of which the order setting aside the sale was passed, and consequently it is asked that the order in question should be declared inoperative against her. It is urged on the other side that she is the wife of a judgment-debtor who was a party to the said proceedings. Whether this is so, or what were the precise relations of the parties, is I think immaterial just now. As in fact the appellant was not a party on the record, and as she is undoubtedly the auction-purchaser, I think she is entitled to a declaration that the order passed in her absence and without notice to her cannot affect her. With this remark, the appeal is dismissed. No order as to costs."

Babu Mahendra Nath Roy (with him *Babu Haraprasad Chatterji* and *Babu Birajmohan Majumdar*),

(1) (1891) All. W. N. 121. (2) (1893) I. L. R. 15 All. 407.

for the respondent, took a preliminary objection to the hearing of the appeal. He contended that no second appeal lay, as such a case between the auction-purchaser and the judgment-debtors cannot be said to be a proceeding under s. 244 or s. 311 of the Code: *Krishna Satapasti* v. *Sarasvatula Sambasiva Row* (1), *Kedar Nath Sen* v. *Uma Charan* (2), *Maganlal Mulji* v. *Doshi Mulji Bhaichand* (3), *Bhagwati* v. *Banwari Lal* (4). See also *Jagarnath Marwari* v. *Kartick Nath Pandey* (5). These cases are not directly in point, but the principle would apply, in the absence of direct authority. The provisions of the Code are clear. See the new Code, O.XXI, r. 92, which corresponds to s. 312 of the old Code. Order XLIII, r. 1, does not cover an order refusing to confirm a sale. Section 47 does not apply to such cases.

Babu Ramcharan Majumdar (with him *Babu Debendra Nath Bagchi, Jr.*), for the appellant, did not oppose this preliminary objection, and contended on the Rule that the auction-purchaser had no notice of the sale being set aside. She should have been made a party to the proceedings for setting aside the sale. The auction-purchaser is a necessary party: *Karamat Khan* v. *Mir Ali Ahmed* (6), *Ali Gauhar Khan* v. *Bansidhar* (7), and judgment in the unreported case of this Court, (Appeal from Order No. 421 of 1906), decided on the 17th January 1908. It was also held in some cases, under the old Code, that the auction-purchaser should be made a party in an application under s. 310A. It naturally follows that he is a necessary party in an application under s. 311A also: see cases cited above, and *Bibi Sharifan*

(1) (1908) I. L. R. 31 Mad. 177.
(2) (1900) 6 C. W. N. 57, 60.
(3) (1901) I. L. R. 25 Bom. 631, 635.
(4) (1908) I. L. R. 31 All. 82.
(5) (1900) 7 C. L. J. 436.
(6) (1891) All. W. N. 121.
(7) (1893) I. L. R. 15 All. 407.

1912

SURENDRA MOHINI DEBI v. AMARESH CHANDRA CHATTERJEE.

v. *Mahomed Habibuddin* (1), *Kripali Singh* v. *Pairoo Raut* (2), *Ishan Chunder Sirkar* v. *Beni Madhub Sirkar* (3) and *Prosunno Kumar Sanyal* v. *Kali Das Sanyal* (4). On general principles the successful bidder has an equitable or inchoate right to have his right prefected.

Babu Mahendra Nath Roy. The petitioner can not be said to be a representative of the decree-holder or judgment-debtors: *Ishan Chunder Sirkar* v. *Beni Madhub Sirkar*(3), *Prosunno Kumar Sanyal* v. *Kali Das Sanyal* (4) and *Madhusudan Das* v. *Gobinda Pria Chowdhurani* (5) are distinguishable. See also *Sreenath Ghose* v. *Roma Nath Santra* (6), *Krishna Satapasti* v. *Sarasvatula Sambasiva Row* (7), and *Kedar Nath Sen* v. *Uma Charan*(8). The auction-purchaser is not a necessary party: see cases cited above for respondent.

Babu Haraprasad Chatterji (following *Babu Mohendra Nath Roy*). The petitioner is the auction-purchaser and the wife of the judgment-debtor No. 7. She had certainly notice of the proceedings for setting aside sale: see also *Bhimal Das* v. *Ganesha Koer* (9). Even in a proceeding under section 310A of the old Code, notice to the auction-purchaser is unnecessary: *Bhairab Pal* v. *Prem Chand Ghose* (10).

Babu Ram Charan Majumdar, in reply.

BRETT AND CARNDUFF JJ. A suit was brought by Shib Coomari Debi, who is described in the present Rule as the opposite party No. 21, against other

(1) (1911) 13 C. L. J. 535, 540.
(2) (1909) 11 C. L. J. 86.
(3) (1896) I. L. R. 24 Calc. 62.
(4) (1892) I. L. R. 19 Calc. 683; L. R. 19 I. A. 116.
(5) (1899) I. L. R. 27 Calc. 34.
(6) (1898) 3 C. W. N. 276.
(7) (1908) I. L. R., 31 Mad. 177.
(8) (1900) 6 C. W. N. 57, 60.
(9) (1897) 1 C. W. N. 658.
(10) Civil Rule No. 411 of 1897, (unreported).

persons, who are also parties to this Rule, or against their previous representatives-in-interest for the recovery of the rent of a certain *dur-putni*. Shib Coomari Debi obtained an *ex p rte* decree, and the *dur-putni* was sold in satisfaction of that decree on the 12th June 1907, and purchased by the petitioner in this Rule, Surendra Mohini Debi who, from her description, appears to be the wife of the opposite party No. 7, Jnanendra Nath Chattopadhyaya. On the 31st July 1907 an application was made, under section 311 of the old Code of Civil Procedure, by Debendra Nath Chattopadhyaya, opposite party No. 13, and on the same date three other judgment-debtors, namely, opposite parties Nos. 1, 14 and 17, filed a similar application. The three last-mentioned persons also filed an application under section 108 of the old Code to have the *ex parte* decree set aside. On the 4th January 1908 the application came up for disposal, and a petition of compromise between the decree-holder and the judgment-debtors was filed, by which the decree-holder consented to the sale being set aside on receipt of the amount decreed. The application under section 108 of the Code of Civil Procedure was also dismissed on the same day.

These proceedings were taken without notice to the auction-purchaser, and the case which is set up by the auction-purchaser, who is the petitioner in this Rule, is that she was not aware of these proceedings.

On the 27th March 1908 the petitioner put in an application under section 312 of the Code of Civil Procedure asking that the sale to her might be confirmed and the sale-certificate issued. That application was rejected by the Court of first instance on the ground that the sale, having already been set aside, could not be confirmed. There was an appeal against this order to the lower Appellate Court, and the case

1912

SURENDRA MOHINI DEBI v. AMARESH CHANDRA CHATTERJEE.

was remanded. On remand the Court of first instance arrived at the same conclusion as it had come to before. There was an appeal again to the District Judge against the decision on remand, and the District Judge dismissed the appeal, holding that as the sale had been set aside he could not interfere. At the same time he expressed the opinion that the auction-purchaser, not having been made a party to the proceedings for setting aside the sale, was not bound by them. Against this decision of the District Judge the auction-purchaser first applied to this Court on the 29th November 1909, and obtained the present Rule (No. 4178 of 1909) on the opposite party to show cause why the order of the District Judge, dated the 29th July 1909, should not be set aside, the sale confirmed and the sale-certificate granted to her, or why such other order should not be made as to this Court might seem fit and proper. On the 3rd March 1910 the petitioner also filed an appeal against the same order, which is appeal from order No. 95 of 1910, and the Appeal and the Rule have now come before us for disposal.

A preliminary objection has been taken to the hearing of the appeal on the ground that no second appeal lies, as the present case between the auction purchaser and the judgment-debtors cannot be regarded as a proceeding between the parties to the suit or their representatives under section 244 of the old Code of Civil Procedure. The learned pleader, who appears on behalf of the appellant, does not oppose the objection, and, in our opinion, it must prevail and the appeal be dismissed.

We have then to deal with the Rule, and the ground which the learned pleader has advanced in support of it is that the auction-purchaser was a necessary party to the application under section 311 of the old

Code of Civil Procedure, and that, as she was not made a party, the provisions of the section were not fully complied with, and the order of the Munsiff was made without jurisdiction. In support of the contention that an auction-purchaser was a necessary party to an application under section 311 of the old Code of Civil Procedure, the learned pleader, who appears for the petitioner, relies mainly on the decision of the Allahabad High Court in the case of *Karamat Khan* v. *Mir Ali Ahmed*(1). The learned Judges, who decided that case, appear to have held that, as from the terms of section 312 of the Code, it was obvious that the auction-purchaser must be a party to a proceeding under section 312, it followed that he was also a necessary party in the case of an application under section 311 in order to fulfil the conditions of section 311. Reliance is also placed on a decision of a single Judge of the Allahabad High Court in the case of *Ali Gauhar Khan* v. *Bansidhar* (2). In that case, however, the question for consideration was whether the decree-holder was a necessary party to an application under section 311, and the learned Judge, in deciding that he was a necessary party, appears to have been influenced by the fact that, in the case of *Karamat Khan* v. *Mir Ali Ahmed* (1) to which we have already referred, it was held that the auction-purchaser was a necessary party. The learned Judge held that, if the auction-purchaser was a necessary party, therefore much more the decree-holder should be held to be a necessary party; but he did not consider the question whether, in fact, the auction-purchaser was a necessary party or not Reference has also been made to an unreported case of this Court (Appeal from Order No. 421 of 1906), which was decided on the 17th January 1908. That, however, was an appeal against a decision after remand, and,

(1) (1891) All. W. N. 121. (2) (1893) I. L. R. 15 All. 407.

1912

SURENDRA MOHINI DEBI v. AMARESH CHANDRA CHATTERJEE.

on referring to the judgment and the remand order, we find that the learned Judges of this Court, when remanding the case for a re-hearing, expressed the opinion that the auction-purchaser should be made a party to the miscellaneous proceedings, and the learned Judges, who decided the appeal after remand, having found that the directions of this Court had not been complied with and the auction-purchaser had not been made a party, held that the appeal was defective in form, and that it should be dismissed with costs. The rulings to which we have been referred do not, in our opinion, give as much assistance in the present case.

The learned pleader, who appears for the petitioner, has, however, relied on the provisions of section 310A of the old Code, and he has contended that, as it has been held in certain cases that the auction-purchaser is a necessary party to an application under section 310A, it must necessarily follow that he is also a necessary party to an application under section 311. We have been referred to several decisions in which it has been held that to an application under section 310A the auction-purchaser is a necessary party; but on behalf of the opposite party in the present Rule it has been contended that those decisions are no authority for the contention which has been advanced before us in the present case. Section 311 itself contains no provision to the effect that notice shall be issued to the auction-purchaser, and the ground on which a sale can be set aside under that section is not a ground on which, ordinarily, the auction-purchaser would have any interest or be able to offer any assistance. The ground is material irregularity in publishing or conducting the sale. As the auction-purchaser can have no part in a proceeding with regard to the publishing or conducting the sale, ordinarily he would not be a

person who would be directly interested in an application under that section. The learned pleader for the petitioner has, however, contended that the auction-purchaser has interests in the property which might suffer if the proceedings were not conducted in his presence. He has not distinctly pointed out what those interests are; but we will take it that he refers to what was described in *Adhur Chunder Banerjee* v. *Aghore Nath Aroo* (1) as the equitable or inchoate right of the successful bidder awaiting completion by the grant of the sale-certificate. Sales in execution of decrees are, however, held for the benefit of decree-holders, not of auction-purchasers, and it seems to us that the Legislature in 1882 evidently considered that the latter's interests would be sufficiently safe-guarded by the provisions of section 315 of the old Code. Section 310A does not apply to the same set of facts, as form the subject of an application under section 311; and in an application under section 310A, the purchaser certainly has an interest in seeing that the provisions of clause (*a*) of that section are complied with. Moreover, even in a proceeding under section 310A, it has been held by this Court in *Bhairab Pal* v. *Premchand Ghose* (2) that notice to the auction-purchaser is not necessary. We may further observe that section 313 gives the purchaser a right to make an application to set aside the sale on certain special grounds, and in that section there is a distinct proviso that the judgment-debtor shall have an opportunity of being heard against the order. In section 311 there is no such proviso, and it is only since the passing of the new Code of Civil Procedure that a general provision has been inserted in O. XXI, r. 92, giving all persons affected a right to be heard on an application made by the

(1) (1898) 2 C. W. N. 589. (2) Civil Rule No. 411 of 1897 (unreported).

1912

SURENDRA MOHINI DEBI v. AMARESH CHANDRA CHATTERJEE.

decree-holder or any other person to have the sale set aside on the ground of material irregularity in publishing or conducting it. In our opinion the ground advanced by the learned pleader on behalf of the petitioner for setting aside the order of the lower Court cannot be maintained. So far as this Court is concerned, no authority has been produced before us to support the contention that the auction-purchaser is a necessary party to an application under section 311 of the old Code of Civil Procedure, and the reasons given in the decisions of the Allahabad Court, to which we have referred, do not appear to us to be based on sound or sufficient grounds. We, therefore, see no reason tointerfere with the order of the lower Court. The Rule is accordingly discharged with costs.

S. M. *Rule discharged.*

PRIVY COUNCIL.

P. C.* 1911

Oct. 31, *Nov.* 1; 1912

Feb. 21.

DURGA PRASAD SINGH

v.

BRAJA NATH BOSE.

[ON APPEAL FROM THE HIGH COURT AT FORT WILLIAM IN BENGAL.]

Landlord and Tenant—Digwari tenure in Manbhum—Grant of Coal mines by Digwar—Grant of mokurari Lease—Minerals, right to, under the soil —Suit by zamindar claiming mineral rights—Parties to suit—Government—Digwar appointed and liable to dismissal by Government.

Though the Digwari tenures in Manbhum are similar in some respects to the Ghatwali tenures in Birbhum, as having been originally granted in consideration of the performance of military service, to which police duties

* *Present*: LORD MACNAGHTEN, LORD ROBSON, SIR JOHN EDGE AND MR. AMEER ALI.

were attached, and as being hereditary and inalienable, the two kinds of tenure are not analogous : the Ghatwals had special rights under Regulation XXIX of 1814, and, as to minerals, under Act V of 1859, and paid rent direct to Government, and not to the zamindar.

The Digwar of Tasra in Manbhum, appointed and liable to dismissal by Government, was the holder of two mouzahs at a fixed rent payable to the plaintiff (appellant) in whose zamindari they were situate. He granted a perpetual lease of the coal mines underlying the two mouzahs to a coal company who took possession and raised and sold a large quantity of coal. In a suit for a declaration of the zamindar's right to the minerals under the soil and for an account and an injunction :—

Held (reversing the decision of the High Court), that there having been at the time of the permanent settlement, no separate settlement with the Digwar of Tasra (if the Digwari tenure then existed, which was doubtful), and the mineral rights not being vested in him at that time, the presumption was that the mineral rights remained in the zamindar, in the absence of proof that he had parted with them.

Hari Narayan Singh Deo v. *Sriram Chakravarti* (1) followed.

Held, also, that it was not necessary to make the Government a party to the suit. They had never claimed the minerals under the mouzahs in suit, nor put forward any claim inconsistent with the rights asserted by the zamindar ; and the rights of the Government would not be prejudiced or affected by the result of a suit to which they were not a party.

APPEAL from a judgment and decree (18th March 1907) of the High Court at Calcutta, which reversed a decree (14th June 1904) of the Court of the Subordinate Judge of Manbhum.

The plaintiff was the appellant to His Majesty in Council.

The suit giving rise to the appeal was brought against the respondents, Braja Nath Bose and the Tasra Coal Company, and one Mr. Allan Mathewson, who was the transferee of the Tasra Coal Company's rights, for a declaration of the plaintiff's rights to the minerals lying under two villages called Tasra and Rohrabund, situated (as both the Courts below found) within his ancestral zamindari, for a permanent

(1) (1910) I. L. R. 37 Calc. 723 ; L. R. 37 I. A. 136.

1912

DURGA PRASAD SINGH v. BRAJA NATH BOSE.

injunction restraining the defendants from working for coals, and for other relief.

The Subordinate Judge made a decree in favour of the plaintiff. On appeal, the High Court (BRETT and SHARFUDDIN JJ.) reversed that decision and dismissed the suit. The facts of the case and the judgment of the High Court will be found in I. L. R. 34 Calc. 753.

The third respondent, Mr. T. H. Wheeler, was made a party to this appeal as liquidator of the respondent, the Tasra Coal Company, by an order of the High Court dated 30th July 1907.

On this appeal,

Sir R. Finlay, K.C., Ross and *J. M. Parikh*, for the appellant, contended that the Government was not a necessary party to the suit. No doubt the Secretary of State for India might have been made a party, but none of the rights of Government would be affected by the decision of the suit, and the fact that the Secretary of State had not been joined as a party defendant to the suit was not a ground for dismissing it. Reference was made to the Civil Procedure Code (Act XIV of 1882), section 578, and the Civil Procedure Code (Act V of 1908), rule 9. It was also contended that both Courts below having found that the appellant was the zamindar of the villages in suit, and that they were included in his ancestral zamindari for assessment at the time of the permanent settlement, he was presumably the owner of the mineral rights in the soil beneath them, in the absence of any evidence that he had parted with such rights: see *Hari Narayan Singh Deo* v. *Sriram Chakravarti* (1). There was no evidence to show that he had ever granted the mineral rights to the respondents or to any other person: nor was it proved (and both the

(1) (1910) I. L. R. 37 Calc. 723, 730; L. R. 37 I. A. 136, 144.

Courts in India had found it was not) that the Digwars of the villages in suit were independent taluqdars, and the presumption consequently was that they did not possess the under-ground rights in the soil. The grant of mineral rights was inconsistent with a grant of land in consideration of services rendered, *i.e.*, with a service tenure, in the present case police service which the Digwar who held the tenure had to perform. Even if the tenure was a permanent hereditary tenure, the holder had only the right to use the surface of the soil, and not any right to work the minerals which might be beneath it, unless they were expressly granted. Reference was made to *Nilmoni Singh Deo* v. *Bakra Nath Singh* (1). The proprietary rights in the soil belonged to the zamindar. The incidents created by Act V of 1859 and Regulation XXIX of 1814 in the ghatwali tenures in Birbhum were not the incidents of the digwari tenure of the first respondent in the present case, and no analogy could be drawn from them and applied to this case. In any event the onus was on the respondents to show that they had mineral rights in the land in dispute, and that onus they had not discharged.

De Gruyther, *K.C.*, and *A. M. Dunne*, for the 2nd and 3rd respondents, contended that the appellant had failed to establish any title in himself to the disputed mouzahs or the minerals therein. Those mouzahs formed an ancient, permanent, and independent digwari tenure, subject to a quit rent, in which the proprietorship in the soil and sub-soil was vested in the Government, or the Digwar for the time being, and not in the zamindar: and to a suit, the decision in which might affect the rights of the Government, the Secretary of State for India was a necessary party, and the suit was defective, and liable to be dismissed, as

(1) (1882) I. L. R. 9 Calc. 187; L. R. 9 I. A. 104.

1912

DURGA PRASAD SINGH v. BRAJA NATH BOSE.

he had not been joined. The documentary evidence from 1845 showed that the Digwar was analogous to a Ghatwal; that his tenure was held directly from Government; that his services were public services; that the person appointed was appointed and removable by Government, and that his land was not saleable for the debts of the Digwar. Reference was made to Regulation I of 1793, section 8, clause 4; Regulation VIII of 1799, section 29, clause 2; the Report of Mr. Money, Deputy Commissioner of Manbhum, dated 14th November 1814 (see page 775 of I. L. R. 34 Calc.); the Latbandi of 1208 B. S. on which the appellant relied (see page 776 of I. L. R. 34 Calc.); *Hari Narayan Singh Deo* v. *Sriram Chakravarti* (1) which it was contended had no bearing upon, and was distinguishable from, the present case; Harington's Analysis, Vol. II, page 236 (note at bottom of page), Vol. III, page 509; Regulation XXIX of 1814; and *Nilmoni Singh Deo* v. *Bakra Nath Singh* (2). The appellant, it was submitted, had failed to prove that the digwari mouzahs formed a part of his permanently settled zamindari, or that they were the subject of a grant by his predecessors, or the terms of any such grant; and any rights beyond that of realising the quit rent or cess thereon have long since been barred.

Sir R. Finlay, K.C., in reply, referred to *Lelanund Sing* v. *Government of Bengal* (3). As to the omission of mouzah Rohrabund in the Lotbandi (see page 776 of I. L. R., 34 Calc.) [SIR JOHN EDGE referred to the meaning of "Lotbandi" in Wilson's Glossary] it would have been referred to if it had been in existence at the permanent settlement: and reference was made

(1) (1910) I. L. R. 37 Calc. 723; L. R. 37 I. A. 136.

(2) (1882) I. L. R. 9 Calc. 187, 203 to 205, 208; L. R. 9 I. A. 104, 119, 121, 124.

(3) (1855) 6 Moo. I. A. 101.

to *Hari Narayan Singh Deo* v. *Sriram Chakravarti* (1).

The judgment of their Lordships was delivered by

Feb. 21. LORD MACNAGHTEN. The suit out of which the present appeal arises was brought by the zamindar of pergunnah Jharia, a permanently-settled estate, in order to establish his right to the minerals underlying mouzah Tasra and mouzah Rohrabund. The two mouzahs are within his zamindari. They are both held by the Digwar of Tasra on digwari tenure at a fixed rent of Rs. 64 per annum payable to the zamindar.

Digwari tenure is similar to ghatwali tenure. It was granted originally in consideration of the performance of military service, to which police duties were attached. The tenure is hereditary and inalienable. The Digwar is appointed by the Government, and liable to be dismissed by the Government for misconduct. On dismissal the next male heir, if fit for the office, is appointed.

In 1892 the Digwar of Tasra granted a perpetual lease of the coal mines underlying the two villages. The lease became vested in the Tasra Coal Company, Limited. The company took possession and raised and sold a large quantity of coal.

The zamindar asked for a declaration of right, an account and an injunction.

The Subordinate Judge of Manbhum gave judgment in favour of the zamindar. On appeal to the Calcutta High Court, that judgment was reversed and the suit was dismissed with costs.

The case was argued at considerable length in both the Courts below, and fully discussed before this Board.

(1) (1910) I. L. R. 37 Calc. 723, 730 L. R. 37 I. A. 136, 145, 146.

1912

DURGA PRASAD SINGH v. BRAJA NATH BOSE.

Two points, and two points only, were seriously argued. It was contended (i) that the Government ought to have been made a party to the suit, and that in the absence of the Government the suit was defective and ought to be dismissed, and (ii) that the Digwar had a proprietary right in the underground minerals.

The High Court decided both points in favour of the defendants.

In their Lordships' opinion the Government is not a necessary or a proper party to this suit. Apparently the Government does not claim the minerals under permanently-settled estates. However that may be, the Government has never claimed the minerals under the two mouzahs or either of them, or put forward any claim inconsistent with the rights now asserted by the zamindar. The rights of the Government, whatever they are, will not be prejudiced or affected by the result of a suit to which it is not a party.

The second point seems equally clear. The two mouzahs are within the plaintiff's zamindari. Both the Courts below have so held. The permanent settlement was made with the zamindar of Jharia. No separate settlement was made with the Digwar of Tasra, if there was a Digwar of Tasra at the date of the permanent settlement, which seems more than doubtful. No attempt was made to prove that the mineral rights now in question were vested in the Digwar before or at the time of the permanent settlement if the lands were then held on digwari tenure. Nor is there the slightest evidence tending to show or to suggest that the zamindar ever parted with his mineral rights to the Digwar. Mineral rights were vested in the Ghatwals of pergunnah Sarhat, in the north-western part of the Berbhum zamindari, but those Ghatwals paid their rent direct to the Government, and in other

respects they were in a very peculiar position. They were dealt with by Regulation XXIX of 1814. They obtained the right to lease the minerals by the Act No. V of 1859. With every respect to the learned Judges of the High Court no inference can be drawn from the circumstances of their case that the Digwars in Manbhum had similar rights or powers.

The learned Judges on appeal seem to have been misled by a decision of the High Court in the case of *Hari Narayan Singh Deo Bahadur* v. *Sriram Chakravarti* (1) which was afterwards reversed by this Board. There certain persons, called Goswamis or Gossains, priests of a Hindu idol to which a certain village had been assigned on a permanent debattar tenure at a small annual rent, granted a lease of the underlying minerals. The High Court held that the mineral rights were vested in the Gossains. But it was laid down by this Tribunal that it must be presumed that the mineral rights remained in the zamindar in the absence of proof that he had parted with them.

Their Lordships will therefore humbly advise His Majesty that the appeal ought to be allowed, and the decision of the High Court reversed, with costs, and the decree of the learned Subordinate Judge restored.

The respondents will pay the costs of this appeal.

Appeal allowed.

Solicitor for the appellant : *Edward Dalgado.*

Solicitors for respondents 2 and 3 : *Burton, Yeates & Hart.*

J. V. W.

(1) (1910) I. L. R. 37 Calc. 723 ; L. R. 37 I. A. 136.

APPELLATE CIVIL.

Before Sir Lawrence H. Jenkins, K.C.I.E., Chief Justice, and Mr. Justice N. R. Chatterjea.

1912

June 19.

DEOKALI KOER

v.

KEDAR NATH.*

Court-fee—Declaratory suit—Consequential relief, prayer for—Injunction, if consequential relief—Specific Relief Act (I of 1877), s. 42.

Section 42 of the Specific Relief Act does not sanction every form of declaration, but only a declaration that the plaintiff is "entitled to any legal character or to any right as to any property".

A court-fee of Rs. 10 is not sufficient for suits that are not "declaratory suits" in the proper sense of the expression.

An injunction is a consequential relief.

Marsh v. *Keith* (1) followed.

The law as to declaratory decrees discussed.

APPEAL by Musammat Deokali Koer, the plaintiff.

This was a suit for a declaration that a registered deed, dated the 1st of June 1896, for Rs. 14,000, executed by defendant No. 9 in favour of the father and ancestors of defendants Nos. 1 to 8, was collusive, nominal, invalid, fraudulent and without consideration, that the decree passed on the basis thereof which was pending execution in the Court of the First Subordinate Judge at Arrah had been collusively and fraudulently obtained and that it was ineffectual, inoperative and invalid, and further that the mortgaged property in question, as mentioned in the said decree, could not be sold for the satisfaction of the said decree If the Court found any obstacle in granting the above relief, it was prayed in the alternative that it

* Appeal from Original Decree, No. 202 of 1911, against the decree of Raj Narayan Mookerjee, Subordinate Judge of Arrah, dated Feb. 21, 1911.

(1) (1860) 1 Dr. & Sm. 342 ; 62 E. R. 410

might be adjudicated and declared that the decree was not liable to execution without giving credit for the full and proper value of the properties released.

Defendants Nos. 1 to 8 only contested. They contended, *inter alia*, that the suit was not maintainable in the form in which it was presented by reason of the proviso to section 42 of the Specific Relief Act, and that it was insufficiently stamped. There were two other preliminary objections regarding the Court's jurisdiction and the applicability of the doctrine of *lis pendens*.

The Subordinate Judge upheld the contention of the defendants on the point of court-fees and dismissed the suit with costs.

The appellant preferred this appeal to the High Court.

Dr. Sharat Chandra Basak (with him *Babu Chandra Sekhar Banerji*), for the respondents, took a preliminary objection to the hearing of the appeal on the ground that the court-fee paid upon the memorandum of the appeal was insufficient. The suit was not of a declaratory nature without consequential relief. The prayers in the plaint would clearly show this. See Court-fees Act, s. 7, cl. iv (*c*) and Schedule II, No. 17(*iii*), and *Thakur Prosad* v. *Punkal Singh* (1).

Babu Luchmi Narayan Singh (with him *Babu Raghunath Singh*), for the appellant. We being the purchaser at a sale held for arrears of Government revenue, are in possession of the property. We require no possession to be delivered. The suit is, therefore, of a declaratory character, and no consequential relief has been prayed.

[JENKINS C.J. See sections 39 and 42 of the Specific Relief Act.]

(1) (1907) 8 C. L. J. 485.

1912

DEOKALI KOER v. KEDAR NATH.

The proviso to section 42 of the Specific Relief Act has no application to the present case. There are a number of cases in my favour: *Karam Khan* v. *Daryai Singh* (1), *Gour Mohun Gouli* v. *Dinonath Karmokar* (2), *Zinnatunnessa Khatun* v. *Girindra Nath Mukerjee* (3), *Shrimant Sagajirao Khanderav Naik Nimbalkar* v. *Smith* (4) and *Bibi Umatul Batul* v. *Nanii Koer* (5). The unreported judgment in *Ayesha Bibi* v. *Bidhusekhar Mukherji* (Appeal from Appellate Decree No. 1715 of 1909), decided by Mookerjee and Beachcroft J.J. on the 24th April 1912, distinguishes and explains the case of *Thakur Prosad* v. *Punkal Singh* (6). Where a third party is concerned, he need not pray for possession, when he is already in possession: see also *Muttakke* v. *Thimmappa* (7).

Dr. Sharat Chandra Basak, in reply. The cases cited by the appellant are not applicable. The relief claimed are beyond the scope of section 42 of the Specific Relief Act. The power of the Indian Courts to make a declaratory decree is governed by section 42 of the Specific Relief Act.

[JENKINS C.J. See Annual Practice, 1912, vol. II, p. 402.]

JENKINS C.J. This appeal raises the question whether the lower court has rightly held that sufficient Court-fee has not been paid on the plaint. Holding that it has not, the Subordinate Judge has dismissed the suit. On the appeal being opened, a preliminary objection has been raised that the memorandum of appeal is insufficiently stamped. The considerations

(1) (1883) I. L. R. 5 All. 331.
(2) (1897) I. L. R. 25 Calc. 49.
(3) (1903) I. L. R. 30 Calc. 788.
(4) (1895) I. L. R. 20 Bom. 736.
(5) (1907) 11 C. W. N. 705.
(6) (1907) 8 C. L. J. 485.
(7) (1891) I. L. R. 15 Mad. 186.

involved in the objection are substantially those which govern the appeal.

The suit has been treated by the plaintiff as one to obtain a declaratory decree where no consequential relief is prayed; and so she contends, the proper fee both on the plaint and the memorandum of appeal is ten rupees.

The prayers to her plaint are framed in these terms:

"Relief sought for—

"(i) That it may be declared that the Registered Deed, dated 1st June 1896, for Rs. 14,000, executed by defendant No. 9 in favour of the father and ancestors of the defendants Nos. 1 to 8, is collusive, nominal, invalid, fraudulent and without consideration; that the decree passed on the basis thereof which is pending execution in No. 83 of 1909 in the 1st Court of Subordinate Judge at Arrah, has been collusively and fraudulently obtained and it is ineffectual, inoperative and invalid; and that for the satisfaction of the said decree, the mortgaged property in question mentioned in said decree cannot be sold.

"(ii) That if the Court finds any obstacle in granting the above relief, then it may be adjudicated and declared that without the deduction of the fair value of 3 annas shares of each of the mouzahs Sudhia Baradhi, Sirihira, Aailasi-Khurd, Pakdihar, Pira Shankarwar, Amarha, Dadwa and Bhadawra, and excluding the same, defendants Nos. 1 to 8 have no right to lay the whole charge on the remaining property, in claim and to bring about the sale of the said property, and that such decree is not fit for execution and it is invalid, ineffectual and inoperative.

"(iii) That any other relief, which the Court may find the plaintiff entitled to, be granted to her against the defendants, and that the costs of this suit with interest till realization may be awarded against defendants Nos. 1 to 9."

In the view of the Subordinate Judge the prayer in the plaint, though it is in form a mere declaration, practically asks for consequential relief, and it is as a result of this view that he arrived at the decision that is now impugned.

It is a common fashion to attempt an evasion of Court-fees by casting the prayers of the plaint into a declaratory shape. Where the evasion is successful

1912

DEOKALI KOER v. KEDAR NATH.

JENKINS C.J.

it cannot be touched, but the device does not merit encouragement or favour.

The history of decrees merely declaratory is interesting, and a consideration of it may help to a solution of the question involved in this appeal. Such decrees are an innovation, and they first obtained authoritative sanction in England by section 50 of the Chancery Procedure Act, 1852. Before this it was not the practice of the Court in ordinary suits to make a declaration of right except as introductory to relief which it proceeded to administer [Seton on Decrees].

Seven years later, India followed suit with section 15 of the Civil Procedure Code, 1859, where it was enacted that "no suit shall be open to objection on the ground that a merely declaratory decree or order is sought thereby, and it shall be lawful for the Civil Courts to make binding declarations of right without granting consequential relief." By Act X of 1877, the Civil Procedure Code of that year, this section was repealed, but its place had been already taken in anticipation by section 42 of Act I of the same year, the Specific Relief Act. That section provides as follows: "Any person entitled to any legal character, or to any right as to any property, may institute a suit against any person denying or interested to deny, his title to such character or right, and the Court may in its discretion make therein a declaration that he is entitled, and the plaintiff need not in such suit ask for any further relief."

"Provided that no Court shall make any such declaration where the plaintiff, being able to seek further relief than a mere declaration of title, omits to do so."

It is in this section (apart from particular legislative sanction) that the law as to merely declaratory decrees applicable in the circumstances of this case, is now to be found.

The terms of the section are not a precise reproduction of the provision contained in the Act of 1859 and the English Law: in one direction they are more comprehensive, in another more limited. It is common tradition that the section was designed to be a substantial reproduction of the Scotch action of *declarator*, but whether this be so or not is of no great moment. We have to be guided by its provisions as they are expressed. The section does not sanction every form of declaration, but only a declaration that the plaintiff is "entitled to any legal character or to any right as to any property;" it is the disregard of this that accounts for the multiform and, at times, eccentric declarations which find a place in Indian plaints.

If the Courts were astute—as I think they should be—to see that the plaints presented conformed to the terms of section 42, the difficulties that are to be found in this class of cases, would no longer arise. Nor would plaintiffs be unduly hampered if the provisions of section 42 were enforced, for it would be easy to frame a declaration in such terms as would comply with the provisions of the section where the claim was one within its policy.

Now, what are the declarations that are sought in in this case? None relate to the plaintiff's legal character; so only those are permissible which relate to "any right as to any property." Of the declaration in the first prayer of the plaint, none as expressed, is a declaration of this character: it may be that the proposition at which the plaintiff aims is in some measure involved in those declarations, but that is not what is sanctioned by section 42.

The second prayer is open to the same comment. The third prayer expressly seeks relief, though it is general in its terms. I fail then to see how this is such

1912

DEOKALI KOER v. KEDAR NATH.

JENKINS C.J.

a suit as section 42 of the Specific Relief Act contemplates; and if it is not, then it is not "a suit to obtain a declaratory decree where no consequential relief is prayed," as sanctioned by law.

The proceedings of this suit confirm this view, for the plaintiff has successfully sought an interim injunction restraining the defendants, and at this moment, the defendants are restrained by an injunction from pursuing the rights they assert to be theirs.

That an injunction is consequential relief is, I think, clear; the language of the Specific Relief Act favours that view, and it is one that has the sanction of Indian decisions and also of the Court of Chancery in *Marsh* v. *Keith* (1).

I would only add this that the limit imposed by section 42 is on decrees which are merely declaratory, and does not expressly extend to decrees in which relief is administered, and declarations are embodied as introductory to that relief. For such declarations legislative sanction is not required: they rest on long established practice. But for all that the Court should be circumspect and even chary as to the declarations it makes: it is ordinarily enough that relief should be granted without the declaration.

The result then is that the preliminary objection to this appeal must prevail. But we will give the appellant an opportunity of making up the deficiency of court-fees, provided, she pays the required balance within one month from this date. If that be done, then it will be open to the appellant to ask us to make a similar order in reference to the plaint.

N. R. CHATTERJEA J. I agree.

S. M.

(1) (1860) 1 Dr. & Sm. 342 ; 62 E. R. 410.

PRIVY COUNCIL.

IBRAHIM ALI KHAN
v.
MUHAMMAD AHSANULLAH KHAN,
AND CROSS-APPEAL.

P.C.* 1911
Nov. 8, 9; 1912
Jan. 30.

[ON APPEAL FROM THE CHIEF COURT OF THE PUNJAB, AT LAHORE.]

Kunjpura, State of—Sucession to estate of Punjab Ruling Chiefs—Custom—Impartible estate—Primogeniture—Mahomedan law—Suit by junior members of Kunjpura family for shares in estate—Zamindari rights—Property appertaining to Chiefship up to 1849—Property subsequently acquired.

The question in this case was as to the rule of succession applicable to the Kunjpura State situate in the Cis-Sutlej districts of the Punjab. The *riasat*, or *raj*, was founded by Najabat Khan, who in 1748 obtained a *sanad* from the Afghan Conqueror, Ahmed Shah Abdali, granting him an hereditary *jagir* of the villages of which he was then in possession, which were declared to be revenue-free, and held subject to the obligation of maintaining order in his possessions. In 1849, however, the British Government withdrew from the Chief of Kunjpura the civil and criminal jurisdiction under which he had been until then exercising quasi-sovereign powers :

Held, that it had been established beyond doubt that the Kunjpura estate had, ever since the time of Najabat Khan, descended to a single heir who had been recognised as the Chief of an impartible *riasat*, and that attempts by junior members of the family to obtain shares in it had invariably failed. The two instances relied on as showing the allotment of shares to junior members were, in their Lordships' opinion, opposed to that contention ; and no other evidence had been referred to suggesting that there had ever been a division of the estate in accordance with Mahomedan law. The opinion of the Board of Administration in 1852 that the zamindari rights in the villages comprised in the *jagir* were the subjects of "inheritance according to the Mahomedan law," and should be shared by all the members of the family, became ineffective, and was never acted upon in the course of the constant claims put forward by the junior members of the

* *Present* : LORD MACNAGHTEN, LORD ROBSON, SIR JOHN EDGE AND MR. AMEER ALI.

1912

IBRAHIM ALI KHAN v. MUHAMMAD AHSANULLAH KHAN.

family to a share in the estate; and later decisions on those claims laid down in explicit terms that the *zamindari* rights belonged to the *riasat*.

With regard to the property acquired after 1849, in which the Chief Court had decided that the plaintiffs (younger brothers of the defendant who had taken possession of all the property as the eldest son) were by the Mahomedan law entitled to shares:

Held (reversing that decision), that there was nothing to show that the Government in withdrawing the civil and criminal powers which the Chiefs had exercised prior to 1849 intended to make any alteration in their status or to vary the rule which had governed the succession to the estate.

CROSS-APPEALS from a judgment and decree (21st December 1906) of the Chief Court of the Punjab at Lahore, which varied a judgment and decree (30th November 1904).

Both the plaintiffs and the defendant were appellants to His Majesty in Council.

The parties to the suit which gave rise to this appeal were all sons of the late Muhammad Ali Khan, *rais* of Kunjpura. The plaintiffs were the younger sons, and the defendant was the eldest son, who on the release of the estate from the care of the Court of Wards took possession of the whole of his father's property. The plaintiffs claimed to be entitled to share in the inheritance according of the rules of the Mahomedan law which, they contended, governed the family; and the defendant resisted their claim on the ground that in the Kunjpura family the custom of primogeniture obtained, and that he, being the eldest son and Chief of Kunjpura, was entitled to the whole of the father's estate, movable and immovable, and that all that the plaintiffs were entitled to was reasonable maintenance.

The question for determination in this was, therefore, whether in the Kunjpura family the rule of primogeniture prevailed as a custom having the force of law, in regard to all or any of the property claimed, or whether the Mahomedan law was the law of succession.

1912

IBRAHIM ALI KHAN v. MUHAMMAD AHSANULLAH KHAN.

Muhammad Ali Khan died on 13th January 1886, leaving five sons, the defendant, the two plaintiffs, and two other sons, who died without issue and unmarried. The defendant was his eldest son by his second wife, and the plaintiffs were the surviving sons of his third wife.

The defendant, on coming of age and receiving the estate from the Court of Wards, refused to give the plaintiffs the share they claimed, which was four-fifths of the estate, made out as follows :—They stated in a written notice, dated 17th April 1902, that the heirs of Muhammad Ali Khan on his death were the plaintiffs themselves, their two full-brothers, and their half-brother the defendant. Each heir was entitled to one-fifth of the property. On the death of two full-brothers of the plaintiffs, their shares, according to law and custom, devolved upon the plaintiffs alone, who thus became entitled to four shares, and the defendant to one share.

The defendant refused to give them any share whatever of the property, to which he alleged they had no right. The plaintiffs thereupon, on 22nd May 1903, filed their plaint in which they stated their claim as above.

The defendant filed a written statement in which he pleaded that the family to which he and the plaintiffs belonged were governed not by Mahomedan law, but by custom; that by the custom the eldest son inherited all the property left by his father, the other sons receiving only an allowance for their maintenance; that the rule of primogeniture applied to the estate of Kunjpura, and it was not liable to partition; that the plaintiffs were only entitled to reasonable maintenance; but that if it was found that any portion of the property was partible, each of the plaintiffs was not entitled to more than a one-third share.

1912

IBRAHIM ALI KHAN v. MUHAMMAD AHSANULLAH KHAN.

The plaintiffs in reply to the written statement of the defendant alleged that Kunjpura was not a State; that the eldest son had no preferential right; that the property was not free from liability to partition; and that it was governed by Mahomedan law, and subject to be partitioned. They further stated that they were entitled to four-fifths of the estate, and not two-thirds only; and that even if Kunjpura were assumed to be a State (which they did not admit), the property in dispute could not be included in the State, and was liable to partition.

On these pleadings the following issues were settled for trial:—(i) Whether the property is liable to partition? (ii) Whether the rule of primogeniture applies to the family of the Nawab of Kunjpura? (iii) Whether the plaintiffs have any right in the property left by their father? (iv) If the plaintiffs have any right, whether they can recover it? If so, in what manner? (v) If the issues be proved in favour of the plaintiffs, what share of the property they are entitled?

The Subordinate Judge found on the first issue that no property of any kind had ever been partitioned in the family to which the parties belonged, and that therefore no property left by Muhammad Ali Khan, their father, was liable to partition. On the second issue he found that the rule of primogeniture governed the succession in the family. On the third issue he held that the plaintiffs had no right, according to the custom of the family, to have the property partitioned. The other issue he held it was, consequently, unnecessary to decide; and made a decree dismissing the suit.

The plaintiffs appealed to the Chief Court, and a Bench of that Court (F. A. ROBERTSON AND LAL CHAND JJ.) held that the custom of primogeniture was shown to have been in force in the Kunjpura family as

regards all property which formed part of the State before 1849. With regard to lands acquired after that year, the Court was of opinion that the personal law of the parties, the Mahomedan law, applied "as it is clear that no other custom has been shown to govern succession in the family."

The judgment of the Chief Court, in which the history of the family is given and the evidence (almost wholly documentary) which was before the Court is referred to and discussed, was as follows:—

The Kunjpuras are said to be Rohila Pathans of Yusufzai origin. Nijabat Khan, the founder of the family, about the year 1748 received a *sanad* from Abdul Shah Abdali, who was then dominant in the country north of Delhi. In this *sanad* the title of Khan is conferred on Nijabat Khan, and 149 villages, which are stated to already belong to him, were also granted to him as *jagir*, and he was granted the enjoyment of the revenue of these villages in addition to the proprietary right or *biswadari* of the villages which he had already acquired. In the *sanad* it was laid upon Nijabat Khan that he should protect the boundaries of his *illaqa* and keep off the thieves and trespassers and preserve peace. The wording of this *sanad* is important, as it makes it clear that Nijabat was already proprietor in possession of these villages and was granted a *jagir* of them also, in view of his policing them properly and acting as a sort of warder of the marshes. Kunjpura lies about 100 miles, roughly, north of Delhi, only a few miles north of Karnal, and within 20 or 30 miles of Panipat, where the great battle between Ahmad Shah Durani and the Mahrattas, which shattered the power of both, took place in 1760. Much fighting took place about this tract in years following the grant of the *sanad*. Sikh *Sardars* encroached upon Kunjpura land and a convulsive struggle was going on. Nijabat Ali Khan died about 1760, it is said, in defending a tower against the Mahrattas, and was succeeded by his son Dalar Khan. He had seven sons, and it now becomes necessary to ascertain, as far as may be, what occurred on his death. Kamal Khan, one of his sons, is said to have obtained some villages which were wrested from him by the Sikhs and recovered by Dalar Khan, and Ikhtiyar Khan is said also to have had a separate holding, but the whole matter is one of tradition only, and that extremely vague. The separate holdings of Kamal Khan and Ikhtiyar Khan have left no trace in the family history, and it is quite impossible to say upon what basis they were acquired, if they ever were so. Daler Khan seems to have undergone many vicissitudes and to have lost much of

1912

IBRAHIM ALI KHAN v. MUHAMMAD AHSANULLAH KHAN.

his estate before he died in 1773, and Gulsher Khan lost still more. But, according to Massy, about 1787 the fortunes of the family began to improve, and at the very end of the century Gulsher Khan was undoubtedly established as Nawab of Kunjpura, and he was so recognised by General Panon.

Daler Khan left at least four sons ; of these, Gulsher Khan, Karam Sher Khan and Shamsher Khan appear to have been full brothers, and Game Khan a half-brother.

Karam Sher Khan undoubtedly obtained certain villages for himself of about Rs. 6,000 in annual value, and succeeded in separating this off from the State. The times were troublous, and it is suggested that Karam Sher himself acquired these villages, or recovered them from the Sikhs by his own prowess. Further, Karam Sher Khan outlived Gulsher Khan, and Rahmat Khan, who succeeded Gulsher Khan, was married to Karam Sher Khan's daughter. Be the reason what it may, and obviously more than one plausible explanation can be given, Karam Sher Khan got his possession separated off. They were not resumed at his death, and they have been succeeded to by his descendants in accordance with Mahomedan law. It is, however, to be noted that according to the orders of Government, and the entries in records-of-rights prepared at settlement, *i.e.*, in the settlement records, it is provided that the lands are to be continued to Karam Sher Khan's family so long as any of his descendants remain, and are then to revert to the Nawab of Kunjpura. None of Karam Sher Khan's brothers got any separate portion.

We next come to one of the most important occurrences in the family history. On the death of Gulsher Khan he was succeeded as Chief by Rahmat Khan, who it is clear was exercising many of the attributes of independent chiefship or sovereignty, and he was confirmed as an independent Chief in 1811 by a proclamation of the Governor-General. From the record it appears that Rahmat Khan was a weak individual, while Ghulam Muhay-ud-din, his full brother, was a very strong and self-assertive one. There were also three other sons of Gulsher Khan who were half-brothers of Rahmat Khan and Ghulam Muhay-ud-din Khan. It is quite clear that these three, at any rate, never got any "share" according to Mahomedan law, but only somewhat meagre maintenance. The case of Ghulam Muhay-ud-din, however, requires careful examination. It is quite clear that Ghulam Muhay-ud-din never succeeded peacefully to his share under Mahomedan law. He and his brother Rahmat Khan quarrelled violently, and Ghulam Muhay-ud-din took all he could get. Matters got so strained that the Political authorities felt called upon to interfere, and the disputes between the brothers were submitted to arbitration, the arbitrators apparently being Sir Theophilus Metcalfe and Mr. Fraser. The reference to

arbitration and the award itself are not traceable now, but there is upon the record an agreement in accordance with the award in which the Nawab agrees to give five villages to Ghulam Muhay-ud-din Khan, instead of the Rs. 4,500 already fixed "*banabari-saraf as Kanunimoddatt-i-hal*," whatever exactly that expression may mean. It is quite clear, however, not only from this but other papers on the record that whatever was granted to or taken by Ghulam Muhay-ud-din Khan was not his share in accordance with strict Mahomedan law. That document is dated 9th July 1811. There is another letter said to be from Rahmat Khan to Ghulam Muhay-ud-din Khan on the subject of the fixing of boundaries, dated 4th Zi-ul Haj, 1231 (1815), which is relied on for the appellants, but this letter has never been proved nor admitted to be authentic ; and as it was never produced in a long series of disputes, we are unable to accept it as gen uine now.

In 1822, however, further disputes arose, and Mr. W. Fraser addressed Mr. A Ross, Agent to the Governor-General, on the subject. A younger brother of Rahmat Khan and Ghulam Muhay-ud-din Khan had applied to the Government to induce his brother and half-brother, that is, Rahmat Khan and Ghulam Muhay-ud-din, to give him maintenance, and an order had been passed that Rahmat Khan was to pay two-thirds and Ghulam Muhay-ud-din one-third of the maintenance allowance, Rs. 200, granted as the brothers had divided the inheritance in those shares. Ghulam Muhay-ud-din objected altogether to this, alleging that he had not received one-third share, and that what he had got was not a share, but merely maintenance which should not be burdened in favour of other relatives. Mr. Fraser's letter setting forth Ghulam Muhay-ud-din's case is curiously violent, and the facts are dealt with fully in a letter from R. Ross, Deputy Superintendent, to A. Ross, Agent to Governor-General, dated 2nd July 1882.

The position and the reasons why Ghulam Muhay-ud-din was allotted what was given to him are, however, made clear in the letter of Sir Charles Metcalfe, dated 4th December 1822. He says : "Had the questions there been as to the right of Ghulam Muhay-ud-din Khan to a portion, as one of several younger brothers, he must, I conceive, have received smaller provision than what he obtained. But that was not the question, nor was the matter settled to the best of my recollection on any ground of right ; the adjustment was simply an agreement between the parties, both yielding to the opinions of the arbitrators. Ghulam Muhay-ud-din Khan was more in the character of a rival than of a younger brother. The two brothers were at war. The arrangement concluded between them was considered by me more as a treaty of peace between contending parties than as a legal settlement of mutua rights." This letter perhaps throws some light upon the reason why Karam Sher Khan obtained separate rights before the advent of British rule : *see* Massy, page 173.

1912

IBRAHIM ALI KHAN v. MUHAMMAD AHSANULLAH KHAN.

It is not necessary to go through all the correspondence on the subject. A letter from Sir David Ochterlony, dated 13th July 1822, shows that in his opinion when the arbitration was carried out between Ghulam Muhay-ud-din Khan and the Nawab, the claims of the other younger brothers were entirely overlooked, and their existence not brought to the notice of the arbitrators.

The final proposals of the Agent to the Governor-General sent up for the orders of Government are contained in a letter dated 13th August 1822. In this connection it is important to notice first, however, that in the letter of Mr. Fraser, which starts this correspondence, to A. Ross, Agent to Governor-General, Delhi, and which states Ghulam Muhay-ud-din's case on his behalf, expressions are frequent which clearly show that Ghulam Muhay-ud-din's claim was always to proper maintenance, and that his right to a share according to Mahomedan law was never even thought of. In paragraph 3 he says : "So far back as 1806 Rhamat Khan and Ghulam Muhay-ud-din had disputes which terminated in an open rupture. They originated in Ghulam Muhay-ud-din's claim requiring from his brother a sufficient maintenance. This was refused by Rahmat Khan, and he seized some villages by force. Mr. Metcalfe and myself are both at hand to certify that the assignment to Ghulam Muhay-ud-din Khan was entirely for the purpose of providing him with a proper maintenance, and not intended to have the appearance even of a division or separation of a share from the property of the late Ghulam Sher Khan. . . . For Ghulam Muhay-ud-din Khan, I believe, has scarcely an income amounting to a tenth part of the income of his father's property, and what he does possess has always been considered in the same light as the maintenance now assigned to Rahmat Khan's brother (*i.e.*, the maintenance in the payment of which Ghulam Muhay-ud-din objected to share)." As Mr. Fraser was a strong partisan of Ghulam Muhay-ud-din and was urging all he knew in his favour, it must clearly be accepted as a fact that Ghulam Muhay-ud-din got what he got from Rahmat Khan, not as a share in one sense of Mahomedan law, but as suitable maintenance. Sir Charles Metcalfe does not support all that Mr. Fraser says, and Captain Ross in his letter dated 2nd July 1822 estimates the actual value of this allotment to Ghulam Muhay-ud-din as equal to about $\frac{1}{4}$th of the whole Rs. 12,000 as compared to Rs. 30,000, *i.e.*, Rs. 12,000 out of Rs. 42,000. In referring the question as to whether the maintenance allowance to Ghulam Rasul Khan, Ghulam Muhammad Khan and Sher Ali Khan, the younger and half brothers of Rahmat Khan, should be paid by Rahmat Khan Nawab alone or by him and by Ghulam Muhay-ud-din Khan, his brother, in the proportion of 2 shares to 1—the subject is discussed in some detail by the Agent to the Governor-General. This is important. The estimate of the annual value of the

property held by the Nawab is here given at not less than Rs. 42,500, and of that held by Ghulam Muhay-ud-din at Rs. 10,500, or about $\frac{1}{5}$th of the whole. In paragraph 7 of that letter, Agent to the Governor-General says : "They (the arbitrators) could not have contemplated that any portion of that provision (*i.e.*, the provision made for Ghulam Muhay-ud-din) would ever be demanded from him, or that the Chief was to be relieved from any part of the burden of maintaining his brothers which the usage of the family and the implied conditions on which he held the Chiefship imposed upon him. . . ." Finally, he recommended a reduction in the allowance to be made to the three younger half-brothers from Rs. 2,400 to Rs. 1,500, and that the whole should be paid by the *Nawab* Rahmat Khan. The letter concludes as follows :—"By an arrangement thus modified Nawab Rahmat Khan would not have to pay so much by Rs. 100 as the sum he has already consented to pay, neither could Ghulam Rasul Khan and his brothers object that their provision was reduced to less amount than they are entitled to, while by Ghulam-Muhay-ud-din excused from contribution the usage of the family and also the conditions of the deed under which he enjoys his present income, understood to have been granted by the Resident, would remain inviolate." These proposals were accepted by the Governor-General in a letter dated 15th January 1823.

It is quite clear from the discussion and decision in the case that Ghulam Muhay-ud-din Khan himself took up the position that what he had received, large as it was, was only suitable maintenance, the amount of which has been settled by arbitration, that the three younger brothers, who, although half-brothers, would under Mahomedan law take an equal share with their other brothers in their father's estate, claimed maintenance and only received an allowance of Rs. 2,000 among them, and that the officers who dealt with the case accepted the family usage to be that the person holding the Chiefship for the time being was bound to provide suitable maintenance for his younger brothers out of the father's estate to which he alone succeeded. The learned pleader for the appellant could only urge in deprecation of the effect of this instance that Ghulam Muhay-ud-din took up the position that his grant was for maintenance only to suit his own ends and to avoid contributing to his younger brother's maintenance ; but even if this were so, the fact remains that he did take up this position, and that the British officers held that his contention was in accordance with the family usage, and no explanation whatever is given for the fact that the three younger brothers, equally entitled, clearly never set up any claim to anything but maintenance, to which they did set up a claim, which was granted to the extent of Rs. 2,000 only. Ghulam Muhay-ud-din Khan died in 1841. Muhammad Yar Khan was a minor, but strong claims were put forward on his behalf to succeed to the whole property of Ghulam Muhay-ud-din Khan. The letter

1912

IBRAHIM ALI KHAN v. MUHAMMAD AHSANULLAH KHAN.

of G. Clark, A. G. G., dated 21st July 1841, is important. In that letter the opinion of the writer—that Ghulam Muhay-ud-din had got far more than he was entitled to in 1806 to 1811—is clearly indicated; he says in paragraph 4: "Hence this office has ever since frequently engaged in investigating or preventing the mischievous consequences of his constant endeavours and occasional claims to assume a share also of the authority of the Chief." He is spoken of as a usurper, clever and ambitious, and his nephew, Bahadur Jhan Khan, who succeeded Rahmat Khan in 1822, as a man of very mean abilities. In paragraph 6, C. Clark remarks: "If the British Government would maintain the petty Chiefs in the rights which it finds them enjoying, the appeals of the younger brothers to its intercession should never be listened to beyond the point of securing to them such amount of provision as the usage of the family sanctions."

In paragraphs 10, 11 and 12 he says: "The letter of Sir D. Ochterlony, dated 13th July 1822, and in particular paragraphs 6 and 7, and the letter of Mr. A. Ross, dated the 13th August 1823, contain, I think, all that is necessary to establish the rights of the *Rais* now to recover, as he claims to do, some portion of this assignment. Mr. Ross, it will be observed, states that the provision so assigned and was judged by the arbitrators to be necessary for his (Muhay-ud-din Khan's) support in a manner suitable to his station, as full-brother of the Chief, and the annexed document, relating to their decision, will be found to contain nothing from which it can be inferred that even they contemplated that this grant should descend entirely to Muhay-ud-din Khan's successors. The ordinary provision for a younger brother of this family is five wells of land. In the present case the *Rais* does not seem desirous of reducing the only child of his late uncle to this level. He seems mindful of the consideration in which his uncle was held by Europeans, and rather to wish that I should suggest some means of reconciling him to a branch of his family from which, as yet, he has lived estranged, partly owing to his having had advisers of his own surrounding him and partly owing to the bitterness of his late uncle's temper. Should the Honourable the Lieutenant-Governor approve of the opinion, which I have taken the liberty to express upon this subject, he may probably consider that the seven wells and Biana, the two first in the list of the lands of the deceased, would form a suitable provision for his child, and that the rest should revert to the Chiefship. I believe the *Raises* would be satisfied with this revision, but I have no hope that the present advisers of the child, who are vakils seeking for a long litigation of the point, will ever admit that anything less than the whole patrimony is satisfactory to them."

The reply of the Local Government to this was as follows: "In reply, I am desired to inform you that from a perusal of the correspondence

forwarded with your letter under ackowledgment, especially of the despatch of the Agent of Delhi of December 1836, the Honourable the Lieutenant-Governor is of opinion that the child in question has no greater claim to a share of the patrimony than any other cadet of the family. Under this view of the case His Honour concurs with you in considering that the portion of land you propose assigning him will be a suitable provision for his maintenance, while the remainder of the land will revert to the Chiefship."

Here it is again clear that the British officials and the Government held Ghulam Muhay-ud-din's grant to have been maintenance only, and accordingly much the greater part of it was resumed on his death.

This Muhammad Yar Khan brought a suit in April 1851 for certain lands, etc., which he alleged had come to Ghulam Muhay-ud-din, his father, on partition. That suit was dismissed, it being remarked in the judgment of the Commissioner and Superintendent of the Cis-Sutlej Division that whatever the appellants got previously, it was on account of maintenance allowance. The appellant himself admitted this fact. Even if he had not admitted it, still the maintenance allowace cannot be said to be a share as stated by the appellant in the petition of appeal.

Here we find a definite claim to a share fought out and dismissed, it being clearly decided that maintenance only can be claimed. A further claim was dismissed by the Deputy Collector of Thanesar on 28th November 1853. After Muhammad Yar Khan's death in 1882, we find that the then Nawab Muhammad Ali Khan sued Ahmad Hussain Khan and Muhammad Hasan Khan, sons of Muhammad Yar Khan, to recover the lands granted to Muhammad Yar Khan for maintenance, and his suit was decreed by the Subordinate Judge of Karnal on 11th July 1885. There was a clear issue as to whether or not the land in dispute which forms part of the grant to Ghulam Muhay-ud-din Khan and had been continued to Muhammad Yar Khan had been granted as maintenance or not, and it was judicially decided that it had been so granted. This concludes the history of the grant to Ghulam Muhay-ud-din and the claims of his descendants.

It will be most convenient first to deal with all the cases in which claims have been actually made, either by petition to Political or Revenue or Executive authorities or by regular suit, by any of the members of this family against the Nawab. We have dealt with Karam Sher Khan's case and with Ghulam Muhay-ud-din and his descendants. Nawab Rahmat Khan had four sons. Bahadur Jang Khan first succeeded as Nawab, and on his death in 1828 his brother Ghulam Ali Khan succeeded him. Ghulam Ali Khan died in 1841, and was succeeded by Muhammad Ali Khan in 1849 in the latter part of the year, after a proclamation had been issued by the Governor-General taking away all kinds of sovereign rights from the Nawab of

1912

IBRAHIM ALI KHAN v. MUHAMMAD AHSANULLAH KHAN.

Kunjpura. To the effect of this proclamation we shall return later. Muhammad Ali Khan died in 1866, and it is his property which is now in dispute, his sons having been all minors at his death and the estate having been taken over by the Court of Wards.

To return to the sons of Rahmat Khan. In 1833 Shah Baz Khan sued his brother, Ghulam Ali Khan, the then Nawab, for partition. In the judgment it is noted that the defendant Nawab Ghulam Ali Khan stated the custom to be that the plaintiff, his brother, should receive five wells in maintenance, and it is mentioned that when Bahadur Jang Khan was Nawab, his brother, Ghulam Ali Khan, had himself taken five wells for maintenance and now having become Nawab he proposes to pass on these five wells for maintenance to his younger brother, the plaintiff, Shah Baz Khan. It was noted that no suit had been brought in Bahadur Jang Khan's time, and that if Shah Baz Khan was entitled to partition, so was Jan Baz Khan who had brought no such claim. The final order was: "In my opinion it is proper that the plaintiff should be obedient to the defendant, his elder brother, who has agreed to fix the maintenance according to his promise." This decision was by Thomas Metcalfe, on 26th July 1836, as Agent at Shahjahanabad. This was approved by the Local Government, who requested the Nawab to do justice to his brother by fixing his maintenance according to the custom and practice obtaining among the other *Raises* of Kunjpura.

In 1850, after the proclamation of 1849, again we find Shahbaz Khan asserting his claim against Muhammad Ali Khan Nawab, and again his suit was dismissed on the ground that the State lands were not liable to partition and that only grant of maintenance had ever been made.

On appeal it was held by the Settlement Officer that: "It is proved by all the documents sent from the Agent's office that the land attached to the said wells and cash amounts were fixed merely on account of maintenance, and the appeal was dismissed."

Again, we find Shah Baz Khan and his brother, Jan Baz Khan, with others, claiming *zamindari* and *biswadari* rights in village Sharafabad. The Commissioner's order is dated 28th April 1851, and from this there was an appeal to the Board of Administration, which was decided on 27th August 1852. This decision is of some importance, especially in connection with one part of the case. *Mauza* Sharafabad, it is stated, had been acquired by Nawab Rahmat Khan.

In his judgment, dated 27th August 1852, the second member of the Board (Mr. John afterwards Lord Lawrence) says: "On an appeal having been filed previously I sent for the files. On receipt of the files prepared in the Settlement Department and Commissioner's office, I, for the reasons given in my judgment, dated 8th January 1852, held that *zamindari* rights

did not belong to the State, that like other movable and immovable property it should be given by right of inheritance according to Mahomedan law, and that all the descendants of *Nawab* Rahmat Khan who acquired the *zamindari* had rights in it." All the three members of the Board concurred in the above point, and for the final decision of the case the possession of Jan Baz Khan and Shah Baz Khan was relied upon, that is whether they held possession in Sharafabad or not. The parties and we ourselves have made great efforts to find this judgment of 8th January 1852, but it is not forthcoming. The suit was finally dismissed on the ground that Jan Baz Khan and Shah Baz Khan had not had possession within 12 years.

This includes the history of the claim of Shah Baz. Jan Baz Khan, also brother of Rahmat Khan, sued in 1850 for one-third share out of the property attached to the Kunjpura State, and for entries to be made in Settlement records in his name as regards one-third share. This claim was dismissed on the ground that it was quite clear that the State was not liable to partition, and the fact that Ghulam Muhay-ud-din Khan had in his application sent to the Government clearly alleged that he had received no share out of the State, that whatever he received was by way of maintenance allowance, that it was a great hardship if he was forced to pay for the maintenance of his other brothers, as mentioned in the letter of Mr. Lawrence, the Agent to the Governor-General, dated 12th August 1822, was relied on *inter alia*. The suit was dismissed by Mr. W. Wynyard, Settlement Officer, Cis-Sutlej districts, on 27th November 1850. Finally, the matter came on appeal before Sir Henry Lawrence, first member of the Board of Administration. The appeal was dismissed, the order dealing *seriatim* with the grounds of appeal. One of the grounds (2) urged was that as the *Rais* had by the notification of 1849 been deprived of civil executive powers, the State of Kunjpura was no longer like those States, the partition of which is impossible ; but Sir Henry Lawrence's decision, which is badly translated and is not too lucid in original, was to the effect that the reduction of the civil and criminal powers did not render the State liable to partition.

Two other cases which do not appear in the printed paper-book require notice.

In 1882, one son of Muhammad Yar Khan claimed further maintenance from the then *Nawab*, and the matter was referred to the Local Government. The then Lieutenant-Governor, Sir Charles Aitchison, pointed out that it was not a matter which could be settled by executive authority, and that he could only dispose of it finally if asked to act as arbitrator between the parties, which he was willing to do. He was appointed arbitrator, and in his award clearly accepted the principle that all that the younger members of the family could claim from the Nawab was reasonable maintenance. The award was given in 1884.

1912

IBRAHIM ALI KHAN v. MUHAMMAD AHSANULLAH KHAN.

In December 1870, the sons of Muhammad Sher Ali Khan, one of the sons of Nawab Gulsher Khan, half-brother of Rahmat Khan, Nawab, brought a suit against Nawab Muhammad Ali Khan, the *jagirdar* of Kunjpura, for a continuance of the allowance made to their father for maintenance. It will be remembered that it was decided in 1822 that the whole of the maintenance allotted to the three younger half-brothers of Nawab Rahmat Khan was to be paid by the Nawab alone, and no part of it by Ghulam Muhay-ud-din Khan. It was held that the suit, in which the plaintiff alleged that the grant for maintenance was in perpetuity, was triable by a Civil Court, and this Court finally decided that the grant for maintenance was for life only, they being only life grants resumable after the death of the grantee by the reigning Nawab. Throughout the case it never seems to have been even suggested that they were entitled to share in the inheritance according to Mahomedan law; the claim of the plaintiffs was that they were entitled to succeed to the maintenance granted to their father, which they alleged was a grant in perpetuity. This claim was dismissed, the whole question of the custom of the family on that point being fully discussed. It is curious that this case was not brought forward in the lower Court, and is not mentioned in its judgments.

This completes the history of definite claims made in the assertion of personal rights to share in some form or another in the Kunjpura State.

In a letter from the Financial Commissioner to the Commissioner of Delhi, dated 26th April 1887, it is stated that Mr. Barnes, as Commissioner of the Cis-Sutlej Division, in paragraph 16 of his letter No. 853 of 10th May 1854, ruled that there was no reason for debarring the Chief after the decease of Muhammad Yar Khan from again bringing his claim to resume the assignments under the consideration of the authorities of the day, and he then proceeds to say "on a careful consideration of the whole circumstances of the case as disclosed in the correspondence referred to, the Financial Commissioner has no hesitation in holding that Muhammad Yar Khan having died, the assignments made by him should revert to the estate of the minor Nawab, Ibrahim Ali Khan. The village of Biana and the land in Kunjpura held by the deceased have always been held to form part of the estate of the Chief of Kunjpura, and the mere fact that the former *quasi*-independent Chief of Kunjpura had been reduced to the position of a *jagirdar* is not in itself sufficient reason for the resumption by Government of any portion of the lands, which are admitted to have formed part of his original possessions."

We now come to another piece of evidence of some value.

The Kunjpura State held property in the Saharanpur district. We find on the death of Bahadur Jang Khan in 1830 that Ghulam Ali Nawab made a report to the effect that Bahadur Jang Khan was dead and he had come

into possession of the State because it was hereditary and ancestral, and all other property of which he was possessed. Upon this the Qanungo made a report, and an order to the following effect was passed in the settlement record on the 9th May 1832 : " The enquiry and statement of the Qanungo of Mahal and a perusal of some of the papers relating to the previous settlements and received from the office show that the *zamindari* right of the village in question belonged to Rahmat Khan of Kunjpura. After the death of Rahmat Khan, his eldest son, Bahadur Jang Khan, and after the death of Bahadur Jang Khan, his real brother, Ghulam Ali Khan, come in possession thereof. Although the said Ghulam Ali Khan has two rightful real brothers, namely, Shahbaz Khan and Janbaz, but according to the custom of his family Ghulam Ali Khan, *masnad-nashin* of the Kunjpura State, holds possession of the *zamindari* rights of the villages in question."

An extract from the record-of-rights of mauza Rasulpur, pargana Sarsawa, for the year 1232 Fasli (1829) gives an account of the village and of the rights of the *biswadaris*. This is a valuable piece of evidence. It clearly recites that whoever sits on the *masnad*, becomes proprietor of the ancestral estate and responsible to meet the expenses of his brothers and relatives to the extent of their capabilities and relations to the Nawab, but there was no custom of partition ; hence the entries were made in favour of one alone, and according to the custom of the family of the said Nawab the shares of the remaining co-sharers have not been set forth.

A somewhat similar note is given in an order by Mr. Tranco, Collector of the Muzaffarnagar district, on 3rd April 1833, in which the custom of the family is again set forth and entries ordered to be made in accordance with it. In 1849, as noted above, the State was deprived of civil and criminal jurisdiction, and the Nawab reduced to the position of a private citizen. Notice of this was sent to Muhammad Yar Khan through the Nawab. The fact that notice was sent was urged for the appellants as showing independence, but it was sent through the Nawab, which negatives the idea.

Shortly after 1849 settlement operations began, and several of the orders quoted above were passed during the progress of settlement proceedings. We find at Settlement that there were various disputes, but as regards the villages then in the Nawab's possession he was entered as owner. In the *wajibularz* of the 30th October 1853, the following entry occurs in respect of the following villages : Muhay-ud-dinpur, Chhapra, Rasulpur, Sharafabad. In this village the *lambardar*, *jagirdar* and *zamindar* is one and the same person, and he has not the right of alienating the *jagir* and *zamindari* estate, for the reason that the *zamindari* estate belongs to the State. Curiously enough the entry made as to *mauza* Kunjpura itself is not identical with these. It is dated 1856, and does not contain the proviso

1912

IBRAHIM ALI KHAN v. MUHAMMAD AHSANULLAH KHAN.

against alienation, though it recites that the Nawab is sole *zamindar*, *biswadar* and *jagirdar*. In the Saharanpur villages of Mustafapur, Khazanpur Kahadpur and Rasulpur, tahsil Faizabad, Saharanpur, the entry is: "The village is held *zamindari* tenure, and relates to Kunjpura State. Only I, Muhammad Ali Khan, *masnad-nashin*, am in possession of it. No co-sharer can have it partitioned." This is dated 30th September 1859.

When Muhammad Ali Khan succeeded in the end of 1849, after the issue of the proclamation taking away the best remnant of sovereign rights, he was acknowledged as titular Nawab, and was invested with a robe of State (see letter No. 2454, dated 22nd November 1849, from Sir Henry Elliot, Secretary to the Government of India, to Board of Administration). The *jagir*, it is admitted, was continued entirely in the name of the new Nawab, and the entries in the settlement of 1889 was also in favour, except that as regards the *wajibularz* (village administration papers). The entry in 1889 is to the effect that no entry on this point is necessary.

The Kunjpura *jagir* has been brought under the special Act passed in amendment of the Punjab Laws Act of 1872 in 1900, and known as the Punjab Descent of Jagirs Act.

The oral evidence is really of very little value, but we have perused it all.

It appears to us upon a review of the evidence upon the record that the custom set up by the defendant as having obtained in the family up to 1849 is proved beyond all doubt to have been the rule of succession. No doubt up to 1806, when the State came under British protection, times had been very troublous, but this only renders the probability that the eldest son, or as is stated in the settlement records of one of the Saharanpur villages in 1833 the ablest (*laik*) son, would succeed to the *masnad*, and then whoever became *masnad-nashin* succeeded to the whole property of the State subject to the duty of providing suitable maintenance for the younger members of the family. This maintenance seems to have varied in extent, but there is a good deal on the record to indicate that it was understood that the basis of the calcutions should be five wells. We have no hesitation in finding that the custom of the Kunjpura family up to 1849 was for the ablest son to succeed to the *masnad-nashin*, and that whoever succeeded to the *masnad* took the whole estate and provided maintenance for the younger sons. The "ablest" by the ordinary process of evolution when time became settled became the "eldest." The same thing occurred after the proclamation in 1849, but the Nawab Muhammad Ali Khan, who thon succeeded, was an only son. He, however, proceeded at once right and left to assert successfully his rights to resume and revise maintenance grants on the deaths of the grantees, and, as we have seen, he succeded in his intention that the grants were resumable in the Chief Court in the case of Ali Ahmad Khan and others *versus* Muhammad

Ali Khan, Nawab of Kunjpura, decided by this Court finally on review on 11th January 1873. The case now before us, it is urged, is the first case which has occurred since the proclamation of 1849, in which a Nawab has died leaving more than one son, and, it is urged, the resumption of the "sovereign rights" and the reduction of the Nawab to the position of a private gentleman, completely altered the whole aspect of the case, and destroyed the binding force of the custom, if it had every existed.

There does not appear to us to be sufficient reason to hold that the family custom, which we hold to have been established before 1849, was abrogated by the proclamation so far as concerns the property which was then the property of the State. We know that this could not have been in accordance with the policy of the Supreme Government, and we know that in 1849 when the Nawab, Ghulam Ali Khan, died, after the issue of the proclamation, his son was allowed to succeed to the title of Nawab, and was invested with a robe of State (letter 219, dated 4th February 1800, from the Punjab Board of Administration, to Commissioner and Superintendent, Cis-Sutlej States).

The Supreme Government undoubtedly took away certain powers and privileges ; it had done something in this direction in 1837, on which occasion it took away the rights of the Nawab to levy dues, and it at once upon that occasion allotted compensation for the resumption, which is still paid. We are not to assume any intention on the part of the paramount power to interfere further than was necessary for the carrying out of this purpose, which was to provide for the good government of the State, and there is not only no indication that there was any interference with family custom, but every indication to the contrary. We find in the case of *Mahammad Afzal Khan* v. *Ghulam Kasim Khan* (1) that these principles received full assent of their Lordships of the Privy Council. In that case the vicissitudes undergone by the Nawabs of Tonk had been even greater than in the case of the Kunjpura family, and the land there in dispute had been actually for years out of the possession of the Nawab's family and had been re-granted by Government. The case for the existence of a precisely similar custom set up by the Nawab of Tonk was not nearly so strong as it is in regard to the Kunjpura family.

We think, therefore, that the custom set up by the defendant Nawab is made out as regards all property which can be shown to have formed part of the State before 1849. But as regards lands subsequently acquired, we think the case is different. The custom owned its rise and *raison d'etre* to the existence of the State and the exigencies of Chiefship. A family custom, respected by the authorities and fully established as accompanying the

(1) (1903) I. L. R. 30 Calc. 843 : L. R. 30 I. A. 190.

1912

IBRAHIM ALI KHAN v. MUHAMMAD AHSANULLAH KHAN.

Chiefship, must be held to obtain as regards the estates of the Chiefship as such. But when the Chiefship ceased as an independent entity, it was not only privileges but duties and liabilities also which were abrogated, and we do not think that lands and property acquired by the Nawab after 1849 with income, which he was admittedly competent to deal with as he pleased, can be held to be subject to the same rule of succession now as the land which once appertained to the chief as chief. And here also we can obtain valuable guidance from the case of *Mahammad Afzal Khan* v. *Ghulam Kasim Khan* (1) quoted above and known as the Tonk case, decided by a Division Bench of this Court on 3rd January 1898, and by their Lordships of the Privy Council on 15th May 1903.

It appears from the judgment of this Court at page 844 of I. L. R. 30 Calc., that there was a large amount of property in general of over 32,000 kanals —4,000 acres, which the Nawab did not even claim to be subject to the special custom of primogeniture set up, although it had been acquired by the Nawabs, and there was also certain other property of small area which was claimed, but to which the rule of primogeniture was held not to apply. We would apply the same principle here, and we shall uphold the decision of the lower Court and dismiss the claim as regards all the lands which were owned by the State as a State before 1849, and which we hold includes all the lands then in the Nawab's possession and so entered in the Settlement Records of 1852, and we shall decree their share to the plaintiffs of the remaining lands, holding that as regards those the personal law of the parties, that is the Mahomedan law, must apply, as it is clear that no other custom has been shown to govern succession in the family.

On these appeals,

DeGruyther, *K.C.*, and *Ross*, for the appellant in the first appeal and respondent in the second appeal, contended that the evidence established that in the Kunjpura family the rule of primogeniture prevailed as a custom having the force of law in regard to all the property in suit. Reference was made to the "Chiefs and Families of Note in the Punjab" by Sir Lepel Griffin and Colonel C. F. Massy (ed. 1909) [a revised edition of Massy's "Punjab Chiefs" (1890)], pages 14, 15, 18 and 19, *Sundaralingasami Kamaya Naik* v. *Ramasami Kamaya Naik* (2), *Beer Pertab*

(1) (1903) I. L. R. 30 Calc. 843 : L. R. 30 I. A. 190.

(2) (1899) I. L. R. 22 Mad. 515 ; L. R. 26 I. A. 55.

Sahee v. *Rajender Pertab Sahee* (1), *Ram Nundun Singh* v. *Janki Koer* (2), *Mahammad Afzal Khan* v. *Ghulam Kasim Khan* (3). The acquisitions since 1849 formed part of the impartible estate, and descended, as that estate did, and by the same law. *Lakshmipathi* v. *Kandasami* (4), *Sirabjit Partap Bahadur Sahi* v. *Indarjit Partap Bahadur Sahi* (5), *Ishri Singh* v. *Baldeo Singh* (6), and *Kachi Kaliyana Rengappa* v. *Kachi Yava Rengappa* (7) were referred to. The judgment of the Chief Court of the Punjab in *Mahammad Afzal Khan* v. *Ghulam Kasim Khan* (3) had no bearing on the present case.

Sir R. Finlay, *K. C.*, and *G. Considine O'Gorman*, for the respondent in the first appeal and appellant in the second appeal, contended that in the succession to the property in dispute the family was governed by the Mahomedan law. None of the property was at any time held by the Chief of the State as Chief, nor did it belong to the State. In any event, when in 1849 the State was deprived of its independence and the Chief reduced to the status of a private citizen, all the property then held by him became in his hands subject to the ordinary rules of the Mahomedan law. As regarded the *zamindari* rights the ordinary Mahomedan law applied. Reference was made to the decision of Sir J. Lawrence in 1852 in a settlement case, as to the descendants of Rahmat Khan, referred to in the judgment of the Chief Court (8). *Primâ facie* Mahomedan law was applicable. If any custom as primogeniture was alleged to exist, it must be proved, and it has not been established on the evidence

(1) (1867) 12 Moo. I. A. 1, 18, 23.
(2) (1902) I. L. R. 29 Calc. 828, 851 ; L. R. 29 I. A. 178, 193.
(3) (1903) I. L. R. 30 Calc. 843, 862 ; L.R. 30 I. A. 190, 199.
(4) (1892) I. L. R. 16 Mad. 54, 59.
(5) (1904) I. L. R. 27 All. 203.
(6) (1884) I. L. R. 10 Calc. 792, 807 ; L. R. 11 I. A. 135. 148.
(7) (1905) I. L. R. 28 Mad. 508, 512, 515; L. R. 32 I. A. 261, 265, 268.
(8) *Ante*, p. 722.

1912

IBRAHIM ALI KHAN v. MUHAMMAD AHSANULLAH KHAN.

on the record [MR. AMEER ALI pointed out that if Mahomedan law applied, it was in this case subject to a custom, namely, that the daughters did not succeed, which would be an alteration by custom of the Mahomedan law]. The daughters never claimed; there was an agreement in the Courts below that daughters would not, by long custom in the family, succeed. If there was any custom of primogeniture, it would only be as regards the estate itself, and would not apply to any other property as acquisitions to the estate: there was no evidence of that having been the case, nor was there any reason why it should be so. There was a distinction shown between the *jagir* rights and the proprietary rights. In any event, in respect of all property acquired after 1849, no previous family custom would apply, and the Mahomedan law therefore applied to that. Reference was made to *Beer Pertab Sahee* v. *Raiender Pertab Sahee* (1), *Ram Nundan Singh* v. *Janki Koer* (2), *Kachi Kalitana Rangappa* v. *Kachi Yuva Rangappa* (3), *Lakshmipathi* v. *Kandasami* (4), and *Sarabjit Partap Bahadur Sahi* v. *Indarjit Partap Bahadur Sahi* (5), which were distinguished from the present case. "The Punjab Chiefs," by Colonel Massy (ed. of 1909), pages 11 and 19: *Ishri Singh* v. *Baldeo Singh* (6), *Raja Rup Singh* v. *Rani Baisni* (7) and *Muhammad Afjal Khan* v. *Ghulam Kasim Khan* (8) were also referred to.

DeGruyther, *K.C.*, replied. The portion of the claim referring to the *jagir* was withdrawn.

(1) (1867) 12 Moo. I. A. 1.
(2) (1902) I. L. R. 29 Calc. 828; L. R. 29 I. A. 178.
(3) (1905) I. L. R. 28 Mad. 508; L. R. 32 I. A. 261.
(4) (1892) I. L. R. 16 Mad. 54.
(5) (1904) I. L. R. 27 All. 203.
(6) (1884) I. L. R. 10 Calc. 792; L. R. 11 I. A. 135.
(7) (1884) I. L. R. 7 All. 1; L. R. 11 I. A. 149.
(8) (1903) I. L. R. 30 Calc. 843; L. R. 30 I. A. 190.

1912

IBRAHIM ALI KHAN v. MUHAMMAD AHSANULLAH KHAN.

m. 30.

The judgment of their Lordships was delivered by

MR. AMEER ALI. The sole question for determination involved in these two appeals relates to the rule of succession applicable to the Kunjpura State lying in what are called the Cis-Sutlej districts of the Punjab.

The Kunjpura *riasat* lies about 100 miles to the north of Delhi, in the district of Karnal, and was founded in the first half of the 18th century by an Afghan soldier of fortune of the name of Najabat Khan, who, like many other adventurers, native and foreign, had taken advantage of the troublous times when the whole fabric of the Mogul Empire had fallen to pieces to carve out a small principality for himself. In 1748 he obtained a *sanad* from the Afghan conqueror Ahmed Shah Abdali, also called Durani, then in the height of his power in Northern India, granting him a "hereditary *jagir*" of the villages, 149 in number, of which he was in possession at the time. The villages were declared to be *inâm* or revenue-free, and he was to enjoy thenceforth the revenue payable to the Imperial Government, subject to the obligation of maintaining order in his *ilaqa* or possessions.

It is not disputed that the chiefship has from the time of Najabat descended in the male line to a single heir, and that heir has been invariably the eldest son, save in one instance, where the deceased *rais* left no issue and was succeeded by his eldest surviving brother.

Nawab Muhammad Ali Khan, the seventh in descent from Najabat Khan, succeeded to the chiefship in the year 1849. He died in 1886, leaving several sons, three of whom only are now surviving, viz., the defendant Ibrahim Ali Khan, the eldest, and the two plaintiffs, respondents in the first appeal.

1912

IBRAHIM ALI KHAN v. MUHAMMAD AHSANULLAH KHAN.

He left also three daughters, but both parties are agreed that by the custom of the family they receive no share in his inheritance.

The defendant was a minor at the time of his father's death, and during his minority the Court of Wards managed the estate. In 1900 he attained majority and assumed charge of the properties.

The plaintiffs claim that under the Mahomedan law, which they allege governs the succession in their family, they are entitled to shares in the Kunjpura Estate, and they brought this suit against the defendant in the Court of the District Judge of Karnal for partition, possession and " rendition of accounts."

The defendant contested the action on the allegation that the estate of Kunjpura was an impartible *riasat* or principality which had been recognised as such by the sovereign power, and which had descended under the custom governing the family by the rule of primogeniture, and that the younger male members had no title beyond a claim to reasonable maintenance.

It will be noticed that both parties allege the existence of a custom at variance with the Mahomedan law with regard to succession in their family; the plaintiffs restrict it to the exclusion of females from inheritance, whilst the defendant asserts that it extends to the younger male members,

The District Judge found in favour of the custom alleged by the defendant, and dimissed the plaintiffs' suit. On appeal, the learned Judges of the Chief Court have affirmed the view of the District Judge in respect of all property that appertained to the *riasat* prior to 1849, holding that the custom set up by the defendant, which they found established, clearly applied to it. But they were of opinion that as in that year the Government withdrew from the Chiefs of Kunjpura the quasi-sovereign powers they had hitherto exercised,

"the chiefships ceased as an independent entity," and consequently lands and property acquired by the Nawab after 1849 were not subject to the same rule of succession as was applicable to "lands which once appertained to the Chief as Chief."

In this view they decreed the plaintiffs' claim in respect of their shares under the Mahomedan law in the latter properties.

Both parties have appealed from the decree of the Chief Court. The defendant contends that the learned Judges are in error in drawing a distinction between the properties held before and those acquired after 1849, and that the custom, the existence of which has been found by both the Courts in India, applies to all property. The plaintiffs on the other hand urge that the custom alleged by the defendant, on whom the onus lay, has not been established; and that in any event the effect of the withdrawal in 1849 from the Chiefs of all civil and criminal powers was to reduce their status to that of private citizens, subject to their ordinary personal law. That, in substance, represents the contentions of the parties before this Board.

The Chief Court has traced the history of the Kunjpura family with much care and discrimination. Their Lordships do not, therefore, propose to discuss the evidence at any length, for they find it established beyond doubt that the estate of Kunjpura has, ever since the time of Najabat, descended to a single heir, who has been recognised as the Chief of an impartible *riasat*, which is the Arabic or Mussulman synonym of the Hindu word *raj*; and that attempts by junior members of the family to obtain shares in the *riasat* properties have invariably failed. The two instances on which the plaintiffs rely as showing allotment of shares to junior cadets of the family appear to their Lordships to be clearly opposed to their contention.

1912

IBRAHIM ALI KHAN v. MUHAMMAD AHSANULLAH KHAN.

The first is the case of Karam Sher, the second brother of Gulsher Khan, third in descent from Najabat, who obtained, under circumstances that cannot be ascertained at this distance of time, several villages which were separted from the *jagir*, and are still held by his descendants. There is nothing, however, to show that the villages Karam Sher received bore any relation to the share he would have been entitled to on partition under the Mahomedan law. Nor does it appear or is even alleged that Gulsher Khan's brothers other than Karam Sher obtained any share of the family properties. In 1851, whilst the *dastur-ul-amal* or settlement records of these villages were in course of preparation, Nizam Ali Khan, the son of Karam Sher, applied to have his name entered as *jagirdar* of the villages in question. His application was resisted by Nawab Muhammad Ali Khan, who was then the *rais* of Kunjpura, on the ground that the villages held by the applicant had been given to him for maintenance, and that they should revert to the chief on his (the applicant's) death without male issue. The Commissioner of the Cis-Sutlej States, within whose jurisdiction Kunjpura lay, after recording the Nawab's objection, made the following recommendation to Government:—

"I think that all the villages and land possessed by the younger branches of the family should be held and recorded to be component parts of the Chief's integral estate, that while the present incumbents or any of their descendants are living, the Chief be altegether debarred from disturbing or interfering with their possession, and that, on failure of issue in any branch, the lands composing the maintenance (*guzarah*) of that branch revert to the Chief's integral estate, in place of lapsing to the Government, as they would do, were they severed from that estate. The *dastur-ul-amal* would thus be drawn in the name of the *Nawab Rais* (the Chief)."

The Commissioner's view was accepted and affirmed by Government on the 31st October 1851, and the final order was passed by him on the 17th November

following. It is clear, therefore, that neither the Government nor the Chief ever recognised that the villages received by Karam Sher were in lieu of his share by right of inheritance under the Mahomedan law. On the other hand it was alleged on the first opportunity that offered itself that the villages had been granted to Karam Sher and his male descendants for maintenance, and that they were to revert to the *riasat* on the extinction of his male line, and this contention was accepted and affirmed by the Government.

The other instance is that of Ghulam Muhay-ud-din Khan. Gulsher died in 1864, leaving several sons, of whom the eldest, Rahmat Khan, succeeded to the *riasat*. Quarrels then broke out between him and his second brother, Ghulam Muhay-ud-din, about the latter's claim for maintenance, which at last became so violent that the British authorities, who had in the year 1806 assumed charge of the Cis-Sutlej districts, were compelled to interfere. The dispute between Rahmat Khan and Ghulam Muhay-ud-din was referred to the arbitration of the Resident at Delhi, Mr. Metcalfe (afterwards Sir Theophilus Metcalfe) and Mr. Fraser. As a result of the arbitration, Ghulam Muhay-ud-din obtained a number of villages yielding a considerable income. Upon the evidence their Lordships have no hesitation in agreeing with the Chief Court that he received them in lieu of maintenance. In fact some years later, when a younger brother applied for maintenance out of the properties in the possession of Rahmat Khan and Ghulam Muhay-ud-din respectively, the latter objected to his being made liable on the ground that he himself had obtained for maintenance the villages held by him, and he was accordingly exempted from the obligation of contributing towards the younger brother's maintenance.

1912

IBRAHIM ALI KHAN v. MUHAMMAD AHSANULLAH KHAN.

Ghulam Muhay-ud-din died in 1841, and a claim was put forward on behalf of his minor son, Muhammad Yar Khan, to the possession of all the villages that had been held by him. But a part only was assigned to Muhammad Yar Khan for his maintenance, whilst the rest reverted to the chiefship.

As already observed, these two cases, far from supporting the plaintiffs' allegation, appear to their Lordships to be quite opposed to it. No other evidence has been referred to to suggest that there has ever been a division of the estate in accordance with the rules of the Mahomedan law since the time of Najabat Khan. It was, however, contended on behalf of the plaintiffs that although the *jagir* may be impartible and descendible by the rule of primogeniture, the *zamindari* rights in the villages comprised in the *jagir* cannot be so treated in the absence of clear evidence of custom applicable to them. In support of this contention reliance was placed on the dictum of Mr. Lawrence (afterwards Lord Lawrence) pronounced in 1852 in a case which had come before him as a member of the Board of Administration. Janbaz Khan and Shahbaz Khan, two younger sons of Rahmat Khan, had preferred a claim for shares in the *zamindari* rights in one of the villages appertaining to the Kunjpura Estate. Their application was dismissed by the Commissioner. On appeal to the Board, Mr. Lawrence expressed himself as of opinion—

> That *zamindari* rights did not belong to the State, that, like other movable or immovable property, it should be given by right of inheritance according to Mahomedan law, and that all the descendants of Nawab Rahmat Khan, who had acquired this *zamindari*, had rights in it.

The other members appear to have concurred in this view. But the final decision was made dependent on the determination of the question whether Janbaz

and Shahbaz had ever been in possession of the shares which they claimed should be recorded in ther names. They were found, however, never to have been in possession, and their claim was finally dismissed.

The opinion of Mr. Lawrence, however deserving of respect, affords, therefore, little assistance in deciding the question whether the *zamindari* rights are subject to a different rule of succession from the *jagir*. The opinion was, in the result, ineffective, and seems never to have been accepted or acted upon in the course of the constant claims the junior members of the family have put forward to a share in the estate. The decisions in the later cases lay down in explicit terms that the *zamindari* rights belong to the *riasat*. Similarly, it is recorded in the *wajib-ul-arz* that " the entire *biswadari*, *zamindari* and *jagirdari* rights are possessed by the Nawab." Any other conclusion would not only be inconsistent with the policy which the Government has maintained for nearly a century towards these *riasats*, but in the end would prove positively destructive to the chiefships.

It remains, however, to consider whether the view taken by the Chief Court with regard to the rule of succession to acquisitions made by the Chiefs after 1849 is well founded. After holding that the custom set up by the defendant Nawab is made out as regards all property which can be shown to have formed part of the State before 1849, the learned Judges proceed to say :—

" As regards lands subsequently acquired we think the case is different. The custom owed its rise and *raison d'être* to the existence of the State and the exigencies of chiefship. A family custom, respected by the authorities and fully established as accompanying the chiefship, must be held to obtain as regards the estates of the chiefship as such. But when the chiefship ceased as an independent entity, it was not only privileges but duties and liabilites also which were abrogated, and we do not think that lands and property acquired by the Nawab after 1849, with

1912

IBRAHIM ALI KHAN v. MUHAMMAD AHSANULLAH KHAN.

income which he was admittedly competent to deal with as he pleased, can be held to be subject to the same rule of succession now as the land which once appertained to the Chief as Chief."

Their Lordships regret to be unable to follow the reasoning on which the view expressed by the learned Judges proceeds, or assent to the conclusion at which they have arrived. There is nothing to show that the Government, in withdrawing the civil and criminal powers the Chiefs had hitherto exercised, intended to make any alteration in their status or to vary the rule which had governed the succession to the Kunjpura Estate. The withdrawal of those powers was no doubt due to the needs of administration, but that circumstance cannot affect the custom under which the entire estate descended by the rule of primogeniture to a single male heir.

On the whole their Lordships are of opinion that the appeal of the defendent Ibrahim should be decreed, and the plaintiffs' suit dismissed. They will accordingly humbly advise His Majesty to discharge the decree of the Chief Court, and to restore that of the District Judge, dismissing the plaintiffs' suit.

The plaintiffs will pay the costs of these appeals.

Appeal allowed.
Cross-appeal dismissed.

Solicitors for Nawab Ibrahim Ali Khan: *Hartcup & Davis.*

Solicitors for Nawab Muhammad Ashanullah Khan and Nawab Muhammad Yusuf Ali Khan: *T. L. Wilson & Co.*

J. V. W.

ORIGINAL CIVIL.

Before Mr. Justice Fletcher.

LODNA COLLIERY Co., LD.,

v.

BIPIN BIHARI BOSE.*

1912

Feb. 28.

Jurisdiction—Letters Patent, High Court, 1865, cl. 12—Wrongful cutting and removal of coal—Trespass—Disputed boundary—Suit for land—Agreement between predecessors in title of parties—Privity of contract and estate.

The plaintiff company's predecessors in title, who held certain coal lands known as mouza Lodna in Manbhum under a permanent lease, granted an underlease of a share thereof to S, and it was agreed that the boundary should be demarcated between the portion underleased and the portion retained by the grantors, and that a barrier of 30 feet of coal should be maintained between the two portions of the mouza, and that if either party encroached within 15 feet of the boundary line, he should make good any loss sustained by the other party. No boundary was demarcated at the time. The permanent lease of the said mauza was, subject to the said underlease to S, subsequently assigned to T and others, and thereafter the boundary was laid down and marked by the respective agents of T and others, and of S, and a plan showing the boundary was signed by both parties. Subsequent thereto T and others assigned their permanent lease of the mouza to the plaintiff company, and S granted an underlease of his share in the mouza to R L S, who granted an underlease of the same to the defendant who there carried on a colliery. The plaint alleged that the defendant had wrongfully cut into and removed portions of coal from the 30 feet of barrier and beyond it; that the trespass and conversion had taken place within two years; and that the coal so removed had been sold and delivered to the plaintiff company under an agreement to purchase the output of the defendant's colliery, and claimed damages for the value of the coal so removed, and damages caused by the breach of contract in cutting through the barrier.

The defendant denied that he had carried away any coal from the 30 feet barrier, and stated that he had confined his operations well within

* Original Civil Suit No. 61 of 1911.

1912

LODNA COLLIERY CO., LD., v. BIPIN BIHARI BOSE.

the area underleased to him, and that the plaintiff company had never been in possession of the area from which he had carried away coal :—

Held, that the suit, so far as it sought to recover damages for carrying away the plaintiff company's coal, was founded on a case of trespass *quare clausum fregit*, which necessitated the title in respect of that coal being gone into, and was therefore a suit for land within the meaning of cl. 12 of the Charter.

Rajmohun Bose v. *East Indian Railway Co.* (1) distinguished.

That so far as the agreement not to cut into the 30 feet of barrier was concerned, there was no privity of contract or estate between the defendant and the plaintiff company, and the defendant was not personally liable on any of the covenants in the underlease granted to S, and that the plaint did not disclose any cause of action against the defendant based on the agreement.

THE plaintiff company was the owner of certain coal lands known as mouza Lodna in the district of Manbhum, by virtue of an assignment of a permanent *mokurari pottah* or lease under which its predecessors in title held the same. Prior to the said assignment the plaintiff company's predecessors in title had granted a *dur-mokurari pottah* or underlease of a three annas and five gundas share of the said mouza Lodna consisting of a strip of land on the north-west of the said mouza measuring about 190 bighas more or less, to one Golab Chandra Sircar, and it was agreed between the parties to the said underlease that the boundary should be demarcated between the portion of the mouza so underleased and the portion retained by the grantors, and that a barrier or block of coal measuring 30 feet in width should be maintained between the two portions of the said mouza, and that neither party should work within 15 feet on each side of the boundary line, and that if either party encroached on the said barrier of coal and in consequence the other party sustained any loss then the party so encroaching should make good the other

(1) (1872) 10 B. L. R. 241.

party's loss. No boundary was demarcated by the parties to the said underlease, but subsequent to the granting of the said underlease to the said Golab Chandra Sircar, the permanent lease of the said mouza Lodna was, subject to the said underlease, assigned to Alfred Morrison Turner and others, and after the said assignment the boundary was on the 20th July 1897 delineated, laid down and marked by the respective agents and representatives of the said Alfred Morrison Turner and others, and of the said Golab Chandra Sircar, and a plan showing the said boundary was signed by both parties. Subsequent thereto the said Alfred Morrison Turner and others sold the said mouza Lodna, and on the 4th February 1898 assigned their permanent lease, to the plaintiff company, and the said Golab Chandra Sircar on the 30th September 1899 assigned his rights in or granted an underlease of his portion of the said mouza consisting of the said 190 bighas of land more or less, to one Ram Lal Singh, who on the 4th February 1909 granted an underlease of the same to the defendant who there carried on a colliery known as the North Burrakar Colliery.

The plaint after setting out the above facts and stating that the defendant dwells and carries on business and personally works for gain at 166, Cornwallis Street in Calcutta, alleged that the defendant had cut into and removed portions of the coal not only from the whole of the 30 feet of coal forming the barrier agreed to be left unworked, but also portions of the coal belonging to the plaintiff company on the south side of the barrier; that the said conversion of the plaintiff company's coal and trespass on the plaintiff company's property and the breach of contract by the defendant in not maintaining the said barrier had taken place within two years prior to the filing of the plaint; that the plaintiff company had

1912

LODNA COLLIERY CO., LD., v. BIPIN BIHARI BOSE.

for some years past purchased from the defendant the whole of the output of his North Burrakar Colliery and that the price paid for the same during the past two years was Rs. 4-12 per ton in 1909, and Rs. 3 per ton in 1910; that the defendant had in fact sold and delivered the plaintiff company's own coal to the plaintiff company, for which coal it was entitled to charge the defendant at the highest rate paid by it to the defendant during the last two years, and that the quantity of coal estimated to have been so sold and delivered if calculated at the said rate amounted to Rs. 90,902-8; that by reason of the defendant having wrongfully cut through the said barrier the plaintiff company had further sustained loss and damage in that it had become necessary for the safety and preservation of its colliery to leave another barrier of coal 30 feet in width on the south of the said boundary line which could not in consequence be worked or utilised by the plaintiff company and the value of the coal in which less the cost of raising the same amounted to Rs. 1,21,021-6 which the plaintiff company claimed as additional damages from the defendant; and that at one portion of the defendant's colliery where the defendant had cut into the plaintiff company's working there was a portion where the plaintiff company's working could only be rendered safe by the insertion of *pucca* masonry buttresses at a cost of about Rs. 4,000. The plaintiff company prayed (*a*) for judgment for the said sum of Rs. 90,902-8, or an enquiry into the amount of the plaintiff company's coal raised by the defendant and sold to the plaintiff company and the moneys realized by such sale with such proper deductions as the Court may direct, (*b*) for discovery from the defendant of the quantity of the plaintiff company's coal so raised or disposed of, (*c*) for interest on the amount so awarded as further

damages, (*d*) for Rs. 1,21,012-6 for breach of contract and injury to the plaintiff company's colliery, and (*e*) for a further sum of Rs. 4,000 as damages unless the defendant undertook to protect and secure the plaintiff company's working by erecting a masonry buttress to the satisfaction of the plaintiff company's servants and surveyors.

The defendant in his written statement, *inter alia*, denied that the boundary referred to in the plaint was ever laid down or delineated or marked on the land itself either by the said Golab Chandra Sircar or his representatives, and stated that the plan alleged by the plaintiff to have been signed by the parties was erroneous in essential particulars and was therefore not binding on the said Golab Chandra Sircar. The defendant further stated that he had confined his mining operations well within the limits of the area comprised in the underlease granted to his predecessor in title the said Golab Chandra Sircar; that he had not cut or carried away any coal from the belt of 30 feet agreed by the said underlease to be left as a barrier; and that the plaintiff company had never owned or been in possession of the area from which the defendant had cut and carried away coal the same being always his property and in his possession. The defendant submitted that the suit as framed directly involved the determination of title to land situate outside the local limits of the ordinary original civil jurisdiction of the High Court, and as such was not maintainable in the said High Court.

By mutual arrangement the suit was set down for the determination of the preliminary question as to whether or not the High Court had jurisdiction to hear and try it.

Mr. L. P. E. Pugh (with him *Mr. W. H. Knight*, *Mr. N. Sircar* and *Mr. W. M. Cubitt*), for the plaintiff

1912

LODNA COLLIERY CO., LD., v. BIPIN BIHARI BOSE.

company. It is not disputed that the defendant resides in Calcutta, and the only question is whether this is a suit for land. Although the question of boundary may be incidentally involved that does not make it a suit for land, and the Court has jurisdiction just as it has in ordinary "paddy cutting" cases although the question of boundary may be involved. Our suit is for damages caused by trespass and for breach of covenant in having worked into the 30 feet barrier of coal which the defendant had contracted not to do. It is similar to *Shaw* v. *Stenton* (1).

Mr. S. P. Sinha (with him *Mr. B. C. Mitter* and *Mr. B. L. Mitter*), for the defendant. The real test is to see whether this is in substance a suit for land or to obtain the title to or control over land. If so, it comes within the meaning of clause 12 of the Charter: per Garth C. J. in *The Delhi and London Bank* v. *Wordie* (2), which was discussed in *Kellie* v. *Fraser* (3). To decide this question the Court must look at all the pleadings. The defendant says that he has not gone beyond his boundary. This can only be determined by ascertaining what is the correct boundary, and it is therefore a suit for land. The question whether there has been a breach of covenant also depends upon the boundary line. The object of this suit is to obtain an adjudication that the boundary claimed by the plaintiff company is correct, and such a suit is a suit for land within clause 12 of the Charter: *The East Indian Railway Co.* v. *The Bengal Coal Co.* (4). A suit for specific performance based on an agreement to execute a mortgage of lands lying beyond the jurisdiction of the High Court is a suit for land: *Sreenath Roy* v. *Cally Doss Ghose* (5). In *Crisp* v. *Watson* (6), it

(1) (1858) 2 H. & N. 858.
(2) (1876) I. L. R. 1 Calc. 249, 263.
(3) (1877) I. L. R. 2 Calc. 445, 463.
(4) (1875) I. L. R. 1 Calc. 95.
(5) (1879) I. L. R. 5 Calc. 82.
(6) (1893) I. L. R. 20 Calc. 689.

was held that a suit for damages for trespass to land in the plaintiff's own possession situated outside the jurisdiction of the Court is not a suit for which relief can be entirely obtained through the personal obedience of the defendant, and the Court has no jurisdiction to try it.

Mr. W. H. Knight, in reply. The plaint does not make any claim for declaration of title, or possession or control over land, but merely for damages. The defendant is not entitled to set up that this is a boundary dispute. We deny that there is any such dispute. Our suit is framed in contract and we are not bound by the defendant's pleading. A suit does not become a suit for land merely because some question relating to land or of title to land is incidentally involved, or wherever land has anything to do with the suit: *Juggernauth Doss* v. *Brijnath Doss* (1), *Land Mortgage Bank* v. *Sudurudeen Ahmed* (2), and *Bapuji Raghunath* v. *Kuvarji Edulji Umrigar* (3). The Court has jurisdiction to try a suit for damages for the forcible cutting and carrying away of grass from the plaintiff's land although the defendant denies the plaintiff's title to the land: *Krishna Prosad Nag* v. *Maizuddin Biswas* (4). The case of *The East Indian Railway Co.* v. *The Bengal Coal Co.* (5) is distinguishable from the present case. In that case the plaintiff asked for a declaration that a certain boundary line was as alleged, that is, a declaration of title to land, and for an injunction and for possession. Our plaint does not ask for any such reliefs, but merely for judgment and damages against a defendant who resides and carries on business within the jurisdiction. In such suits

(1) (1878) I. L. R. 4 Calc. 322.
(2) (1892) I. L. R. 19 Calc. 358, 367.
(3) (1890) I. L. R. 15 Bom. 400.
(4) (1890) I. L. R. 17 Calc. 707.
(5) (1875) I. L. R. 1. Calc. 95.

1912

LODNA COLLIERY CO., LD., v. BIPIN BIHARI BOSE.

the Court has jurisdiction although the relief sought is in respect of acts done on land outside the jurisdiction : per Macpherson J. in *Raimohun Bose* v. *East Indian Railway Co.* (1); and the Court can even adjudicate upon the plaintiff's title to land in another district : *Chintaman Narayan* v. *Madhavrav Venkatesh* (2), which was approved of in *Rajmohun Bose* v. *East Indian Railway Co.* (1). Clause 12 of the Charter contemplates the old suit for ejectment. This view is supported by the decision in *The East Indian Railway Co.* v. *The Bengal Coal Co.* (3). The decision in *The Delhi and London Bank* v. *Wordi* (4) was explained by Macpherson J. in *Kellie* v. *Fraser* (5) as being founded on the fact that there the question of title to land was directly in issue. An action for trespass does not decide title to land : *Peary Mohun Ghosaul* v. *Harran Chunder Gangooly* (6). At most it decides title as between the two parties to the suit. Trespass is transitory, only possession is local. We are not seeking for any decision as to title to land or for possession. We have paid money to the defendant under a mistake of fact, and are entitled to an account.

FLETCHER J. This is a suit brought by the plaintiff company against the defendant, Bipin Bihari Bose, to recover first of all the sum of Rs. 90,902-8, or for an enquiry as to the amount of the plaintiff company's coal raised by the defendant and sold to the plaintiff company and the moneys so realized by the defendant with such proper deduction as the Court may direct ; and, secondly, for discovery from the defendant of the quantity of the plaintiff company's coal so raised or disposed of ; thirdly, for interest by

(1) (1872) 10 B. L. R. 241, 248.
(2) (1869) 6 Bom. H. C. 29.
(3) (1875) I. L. R. 1 Calc. 95.
(4) (1876) I. L. R. 1 Calc. 249.
(5) (1877) I L. R. 2 Calc. 445, 465.
(6) (1885) I. L. R. 11 Calc. 261.

way of further damages ; fourthly, for Rs. 1,21,012-6 as damages for breach of contract and injury to the plaintiff company's colliery; and, fifthly, unless the defendant should undertake to protect and secure the plaintiff company's workings by masonry buttresses to be erected to the satisfaction of the plaintiff company's servants and surveyors, for a further sum of Rs. 4,000 as damages.

Now, in the first paragraph of the plaint it is set out that the plaintiff company is the proprietor of a colliery and is the owner under a permanent *mokurari pottah* or lease of mouza Lodna in Manbhum subject as to a portion thereof to an underlease or *dur-mokurari pottah* granted by predecessors in title of the plaintiff company in favour of one Golab Chandra Sircar of a portion on the north-west of the said mouza. In the second paragraph is set out that by the terms of the said underlease, dated the 7th Assin 1303 B. S., corresponding with the 22nd September 1896, it was agreed that the boundary should be demarcated between the portion of the said mouza retained by the grantors and the portion underleased as aforesaid and that a barrier or block of coal 30 feet in width should be maintained between the two portions of the said mouza and that neither party should work 15 feet of coal on each side of the boundary line, and that if either party encroached on the barrier and in consequence the other party should sustain any loss then the encroaching party should make good the other's loss. The third paragraph alleges that no such boundary was actually laid down by and between the original parties to the said underlease but subsequent to the purchase of the said mouza and an assignment of the *pottah* under which the same was held on the 5th June 1897 to Alfred Morrison Turner, George

1912

LODNA COLLIERY CO., LD., v. BIPIN BIHARI BOSE.

FLETCHER J.

Hampson Morrison, Henry Blois Hawkins Turner, and Charles Edward Smyth, the boundary was on the 20th July 1897 delineated, laid down, and marked by the agents and representatives of the said A. M. Turner, G. H. Morrison, H. B. H. Turner and C. E. Smyth on the one hand and of the said Golab Chandra Sircar on the other hand, and a plan showing the said boundary was signed by both parties. In the fourth paragraph the plaint alleges that the plaintiff company is the assignee of those named gentlemen. Then in the fifth paragraph the plaintiff company alleges that Golab Chandra Sircar assigned his rights in or granted an underlease of his portion of the said mouza so delineated as aforesaid to one Ram Lal Singh, and that the said Ram Lal Singh granted an underlease of the same portion of the mouza to the defendant who there carries on a colliery known as the North Burrakar Colliery. In the sixth paragraph it is alleged that the plaintiffs and defendant dwell and carry on business and personally work for gain in Calcutta. The seventh paragraph alleges that the defendant has so conducted his mining operations at the North Burrakar Colliery that he has cut into and removed portions of the coal forming the barrier agreed to be left between his North Burrakar Colliery and the plaintiff company's Lodna Colliery, and has cut and carried away coal from the 15 feet agreed to be left on the north of the boundary line in breach of the agreement contained in the said underlease, and has also cut and carried away coal from the south or plaintiff company's portion of the barrier, and has further cut through the said barrier, and cut and carried away the plaintiff company's coal on the said side of the said barrier. Then the eighth paragraph alleges that the plaintiff company is unable to state the exact dates and times when the defendant cut into and through

the said barrier, but the fact that an encroachment had been made was only recently discovered by the plaintiff company and the plaintiff company believes and charges that all the said conversions of the plaintiff company's coal and trespasses in the plaintiff company's property and the defendant's breach of contract is not maintaining the said barrier, have taken place within two years prior to the filing of the plaint. Then the 9th paragraph alleges that the plaintiff company had an arrangement under which the plaintiff company bought from the defendant the whole of the output of the defendant's colliery at prices which during the last two years were Rs. 4-12 in 1909 and Rs. 3 in 1910, and the plaintiff company alleges that they are entitled to charge the defendant for the coal belonging to the plaintiff company abstracted by the defendant from the plaintiff company's property and sold to the plaintiff company at the highest rate paid by the plaintiff company for such coal during the past two years. In the 10th paragraph it is alleged that the amount of coal, so far as the plaintiff company has been able to ascertain, amounts to 17,314 tons of steam coal and 5,774 tons of slack, and the plaintiff company claims from the defendant the sum of Rs. 90,902-8 in respect of the same which is the first amount claimed in the prayer. Then the 11th paragraph says that by reason of the wrongful act of the defendant in cutting through the said barrier the plaintiff company has further sustained loss and damages in that it has become necessary for the safety and preservation of the plaintiff company's colliery to leave another barrier of coal as shown on the plan thereto annexed to the south of the coal belonging to the plaintiff company worked out by the defendant, of the width of 30 feet. By reason of the wrongful acts of the defendant and the necessity for

1912

LODNA COLLIERY CO., LD., v. BIPIN BIHARI BOSE.

FLETCHER J.

leaving a new barrier, an area of land containing approximately 32,641 tons of steam coal and 10,849 of slack of similar qualities to that raised by the defendant and sold to the plaintiff company has become unworkable and cannot be utilized by the plaintiff company. The value of such coal and slack, less the cost of working and raising it, is Rs. 1,21,012-6, and the plaintiff company claims the said sum as damages inasmuch as the plaintiff company's colliery has been injured and damaged by the defendant to that extent. In the 12th paragraph of the plaint is set out that at one portion of the defendant's colliery where his workings adjoin the plaintiff company's workings and the defendant has cut through to the plaintiff company's workings, there is a portion where the plaintiff company's workings can only be rendered safe by the insertion of *pucca* buttresses at a cost of about Rs. 4,000. In the 13th paragraph it is alleged that the plaintiff company's causes of action arose at Lodna on dates within three years.

Now the question that has been argued at the present stage is, does this plaint disclose a cause of action, which this Court can try? In my opinion it does not. First of all, the case as to the carrying away of coal is founded on the ordinary case of a trespass *quare clausum fregit*, that is, the defendant broke through and entered the plaintiff company's mine or land and carried away coal belonging to the plaintiff company. That it seems to me is the nature of the suit. Now a suit of that nature seems, so far as I can gather from the decisions of this Court, to be one that would be considered as a suit for land or immoveable properties within the meaning of the clause 12 of the Letters Patent of this Court. I think there is a great deal to be said if the matter could be treated as *res integra* in the argument put forward by Mr. Knight;

but suits for land are well defined by the decisions of this Court. The Bombay High Court has taken the other view; and it seems to me to be a much more likely one in respect of suits for land or other immoveable properties. But the matter has been considered over and over again in this Court.

Now, applying the principles laid down in the decisions of this Court to the suit in question, it seems to me that in so far as the plaintiff seeks to recover damages for the defendant having broken into his close and carried away his coal it will become necessary that the title in respect of that coal must be gone into, whether the defendant had the right to break through or not. In so far as that portion of the case is concerned, I do not think that having regard to the decisions, that have been dealt with very fully and with great ability by both Mr. Sinha and Mr. Knight, that I can decide otherwise than that this is a suit for land. The decisions of the Appellate Court are binding upon me, and I cannot go behind them. It seems to me that so far as the same is a suit to recover damages arising out of an action for trespass to land, that is a suit for land; in one of the cases cited, Garth C. J. expressly refers to a suit for trespass as being a suit for land. In England it has always been considered as a suit for land. The case of *Rajmohun Bose* v. *East Indian Railway Co.*(1), which Mr. Knight has relied on, was a very different case. In that case a man sued the East Indian Railway Company for carrying on a forge and other works on land adjoining his. That was not a suit for trespass to land, but it was really a suit in respect of nuisance, and that case is wholly distinguishable. In so far as this suit seeks to recover damages by reason of the defendant having broken into close and carried away

(1) (1872) 10 B. L. R., 241.

1912

LODNA COLLIERY CO., LD., v. BIPIN BIHARI BOSE.

FLETCHER J.

the plaintiff company's coal, I am of opinion this is a suit for land.

The other point put forward by Mr. Knight was that in the original underlease Golab Chandra Sircar had covenanted that he would leave the barrier as was provided in the underlease. Now Golab Chandra Sircar according to the allegation in the plaint had either assigned his rights in or granted an underlease to one Ram Lal Singh and Ram Lal Singh granted an underlease to the defendant. That is the allegation in the plaint. So whichever way we take it there is no privity of contract or estate between the defendant and the plaintiff company. The plaintiff company obviously could not sue the defendant on any covenant contained in Golab Chandra Sircar's underlease, either on the ground of privity of estate or otherwise. Another point might arise if the defendant were the assignee of Golab Chandra Sircar, and that is whether that would be a suit for land. So far as I remember it was always held in England that the venue of a suit on a covenant by reason of a privity of estate was local. The defendant is not personally liable on any of the covenants contained in the underlease to Sircar. It seems to me that so far as it is a suit founded upon the terms contained in the underlease, the plaint does not disclose any cause of action, because the defendant is not personally liable to perform the terms of the underlease to Golab Chandra Sircar. That would dispose of the case so far as the plaintiff's claim for breach of contract is concerned.

The next portion of the case is as to a sum of Rs. 4,000 which is claimed as damages that the plaintiff will be put to in erecting masonry buttresses unless the defendant erects such buttresses to the satisfaction of the plaintiff company's servants or their surveyors. That sum is claimed on the footing that damage has

been caused by reason of the wrongful act of the defendant in cutting through the said barrier, that stands on the same footing as the carrying away of the coal. It depends on the question, was the defendant justified in cutting through the barrier and carrying away the coal in the same manner suggested? That is the way it is claimed and that is the only ground on which the defendant can be made liable. It seems to me that the sum of Rs. 4,000 stands on exactly the same footing as the sum of Rs. 90,902-8 which is claimed in respect of the coal which the defendant is alleged to have carried away from the plaintiff's land. That being so, that portion of the action in so far as it seeks to recover the sum of Rs. 4,000, comes within the meaning of a suit for land. The Court could not be able to award the plaintiff that sum of Rs. 4,000 without deciding the question of the title to the barrier of coal which the defendant is alleged to have broken through and so caused damage to the plaintiff company. On this ground I think the plaint in this suit does not disclose any cause of action which this Court is competent to try. The plaint must therefore be returned to the plaintiff company. As to costs, the plaintiff company must pay the costs of these proceedings as of a hearing. The plaintiff company will pay the defendant the costs of this suit including all reserved costs on scale No. 2.

C. B.

APPEAL FROM ORIGINAL CIVIL.

Before Sir Lawrence H. Jenkins, K.C.I.E., Chief Justice, and Mr. Justice Woodroffe.

1912

Feb. 29.

In re NISITH C. SEN.*

Municipal election—Representation of associations for voting power—Calcutta Municipal Act (Beng. III of 1899), ss. 37, 38 and Schedule IV, rr. 9 and 10—"Any one individual person," meaning of—Specific Relief Act (I of 1877), s. 45—Practice—Appeal, right of.

In rule 9 of Schedule IV of the Calcutta Municipal Act of 1899, the expression "any one individual person" is controlled by the expression "association of individuals" immediately preceding, and the selection for the representation of the several associations indicated in the rule is limited to the individuals composing the associations.

A rule was obtained by a candidate for election as Commissioner of a certain ward calling upon the Chairman of the Corporation of Calcutta to show cause why he should not prepare and publish the revised list of voters for the ward under rule 10 of Schedule IV of the Calcutta Municipal Act, by rejecting applications filed by a second candidate to have his name entered in the list as the representative of certain associations, and a copy of the rule was served on the second candidate, who together with the Chairman appeared and shewed cause. The rule was made absolute.

Quære: Whether the second candidate had any right of appeal from the order.

APPEAL by Priya Nath Mullick, a candidate for election as Municipal Commissioner, from the judgment of Fletcher J.

The general election of Municipal Commissioners for Calcutta was due to take place in March 1912. On the 1st January 1912 Priya Nath Mullick, who was then the sitting Commissioner for Ward No. 22, applied by written notices to the Chairman of the Corporation to have his name entered in the list of voters for the ward as the person qualified to vote on behalf of a large

* Appeal from original order.

number of companies, firms and Hindu joint families. The applicant was not a member of any of these associations which he sought to represent, and the number of votes which he would by this means get control of amounted to 561. The applicant was a candidate for election as Municipal Commissioner for the same Ward No. 22. The Deputy Chairman of the Corporation fixed the 31st January and the 3rd February for the purpose of hearing all objections to the applications.

On the 31st January and the 3rd February, Nisith Chandra Sen, who was also a candidate for election as Commissioner of the same Ward No. 22, filed his petition raising the following objections against the entering of the name of Priya Nath Mullick as the person qualified to vote on behalf of the various associations: (*a*) that Priya Nath Mullick being a person foreign to the body corporate, Hindu joint family or firm, as the case may be, could not be authorised by such corporation, Hindu joint family or firm inasmuch as such authorisation contravened the provision of rule 9 of Schedule IV of the Calcutta Municipal Act; (*b*) that under section 50 of the Act, Priya Nath Mullick was not entitled to have more than 11 votes allotted to him.

On the 3rd February, the Deputy Chairman overruled the objections and admitted the applications for representation.

Thereupon, on the 23rd February, Nisith Chandra Sen obtained a rule from the High Court, under section 45 of the Specific Relief Act, calling upon the Chairman of the Corporation "to show cause why he should not prepare and publish the revised list of voters for Ward No. 22 under rule 10 of Schedule IV of the Calcutta Municipal Act, 1899, by rejecting the applications filed by Priya Nath Mullick, a

1912

NISITH C. SEN, *In re.*

candidate for election as a Commissioner for the said Ward No. 22, on the 1st January 1912, and why he should not pay the costs of the application," and it was further ordered "that a copy of this order be served on the said Priya Nath Mullick." Cause was shown both by the Chairman of the Corporation and by Priya Nath Mullick. On the 27th February, the rule was made absolute by Fletcher J. His Lordship's judgment was as follows :—

FLETCHER J. This is a rule issued under section 45 of the Specific Relief Act calling on the Chairman of the Corporation of Calcutta to show cause why he should not prepare and publish the revised list of voters for Ward No. 22 under rule 10 of Schedule IV of the Calcutta Municipal Act, 1899, by rejecting the application filed by Priya Nath Mullick, a candidate for election as a Commissioner for the said Ward No. 22 on the 1st day of January 1912, and why he should not pay the costs of this application. Cause has been shown by the Chairman of the Corporation and by Priya Nath Mullick. The point which I have to decide is a short one, but it is not easy to determine. The point has only to do with a Hindu joint family (Mr. Chakravarti interposes :—It is not confined to joint families, but relates also to associations). However that may be, the case has really been argued on the footing of a Hindu joint family, but the real point is on the construction of rule 9 of Schedule 4 of the Calcutta Municipal Act as amended, whether in the case of a company, body corporate, firm, Hindu joint family or other association of individuals whose name has been entered in the list, the "one individual person" duly authorised in this behalf by such company, body corporate, firm, Hindu joint family or association to apply to have his name entered in the list as the person qualified to vote or to be elected in behalf of such company, body corporate, firm, Hindu joint family or association, must be a member of the association or otherwise. It is said that Priya Nath Mullick has obtained a large number of votes under that rule. The sole question is whether the Chairman is authorised to place Priya Nath Mullick on the list of electors under that rule in respect of all these votes. In most of the sections of the Act and the schedule thereto the language is difficult to construe. The rule in question runs :—

"If the name of a company, body corporate, firm, Hindu joint family or other association of individuals has been entered in the list any one individual person duly authorised in this behalf by such company, body corporate, firm, Hindu joint family or association may, by written notice

1912

NISITH C. SEN, *In re.*

FLETCHER J.

sent to the Chairman on or before the said first day of January, apply that his name be entered in the list as the person qualified to vote or to be elected in behalf of such company, body corporate, firm, Hindu joint family or association."

The other rule that applies is rule 10, sub-rule 9 which runs :—

"If no individual person has applied to the Chairman under rule 9 to have his name entered in the list in behalf of a company, body corporate, firm, Hindu joint family, or other association of individuals, the Chairman may determine what individual person shall be entitled to represent such company, body corporate, firm, Hindu joint family or association, and shall enter his name in the list as the person qualified to vote or to be elected in behalf of such company, body corporate, firm, Hindu joint family or association."

These are the two rules which are material, and it really turns on what meaning is to be attached to the word "individual." On the one side the argument on behalf of the Chairman and Priya Nath Mullick is that "individual" means "single"; on the other side the argument is that "individual" indicates that the person belongs to the "association, etc."

It has been pointed out by Mr. Mitter that if "individual" means "single," then the word "one" is unnecessary in the drafting and that the words "one," "individual person" and "one individual person" all have the same meaning.

The matter is of considerable difficulty, more especially having regard to the proviso of section 38, but I come to the conclusion that the two rules taken together only authorise a person, a member of the association, etc., to be entered on the list of voters. It seems to me that if you take rule 10, sub-rule 9, to mean that the Chairman has statutory power to put on the list any man he may meet in the street in respect of a Hindu joint family who have not claimed and who have not authorised any individual to be placed in the register, such a proposition would require extraordinarily strong words in the Statute. The matter is of considerable doubt, but the meaning of "individual" as a person belonging to a class is one of the ordinary natural meanings of the word, and I think that when we take the rule which mentions "association of individuals" and in which then follows the expression "any one individual person", the rule although unscientific in drafting must be read as intending by the words "any one individual person" to refer to a member of the association, etc. As regards "company and body corporate" the case may be more difficult. I cannot think, however, that the Statute ever intended to authorise the Chairman to place on the list of voters as a person qualified to vote or to be elected an individual who has no connection with the association he was to represent and who had not even heard of the association or family.

1912

NISITH C. SEN, *In re.*

FLETCHER J.

I think as I have already said the matter is one of considerable doubt, but having heard the matter yesterday and to-day I have come to the conclusion that unless you can find clear words in the Statute which would authorise the Chairman under rule 10 (*9*) to place any person he thought fit on the register as representing a Hindu joint family, then rule 9 must bear a corresponding meaning, that is that the "individual" has got to be a member of the family, association, etc.

In my opinion that is the only reasonable construction to be put on the rules, though the language of these rules is, as I have already said, exceedingly obscure.

The other question which has been raised is as regards section 50 of the Act, which provides that no person shall give more than eleven votes in any one ward. That I don't think can be gone into on the present application. This application relates to the electoral roll. As to how many votes a person who gets on the electoral roll is entitled to give at any particular election is not now necessary to decide. Whether that person can vote in different wards or in the same ward for more than eleven votes under different qualifications obviously is a matter to be decided by the returning officer, if the question arises. It seems to me, after giving the best consideration I can to the matter, that the Statute did not intend, in the case of a Hindu joint family or other association, that one gentleman should get hundreds or perhaps thousands of votes in any one ward, but it was intended by the Statute that a member of a Hindu joint family or association might be placed on the electoral roll as representing the association or family, and if that was not done a further provision was given by Schedule V authorising a company or firm to vote by Power-of-Attorney which might be given in favour of a person who is either a member of the family, or association or not. It seems to me that the rule ought to be made absolute, and I make it absolute with costs.

From this judgment and order Priya Nath Mullick appealed.

Mr. B. Chakravarti (with him *Mr. C. C. Ghose*), for P. N. Mullick, the appellant. The appellant clearly had a right of appeal from the order. Relief was sought by the petitioner under section 45 of the Specific Relief Act, and it is clear from section 48 of the same Act that the order was appealable. Although the rule strictly may not have called upon the appellant to show cause, the appellant

was directly aggrieved by the order. It was true the Chairman had not appealed: he may have been satisfied with the order as a public officer, but the appellant's private right has been affected, and he should not be debarred from an appeal. Section 51 of the Specific Relief Act empowers the High Court to frame rules to regulate the procedure under Chapter VIII dealing with the "enforcement of public duties"; and rule 483 of the Rules and Orders of the High Court entitled the appellant to show cause on the petitioner's rule. A copy of the rule was served on the appellant, and he appeared and showed cause. This was the proper procedure as indicated in *In the matter of Mutty Lall Ghose* (1). If it be held that the appellant had no right of appeal, it would be putting him in a worse position, than he would have been in, if he had commenced the proceedings. The question in issue on appeal was the construction to be placed on the expression "any one individual person" in rule 9 of Schedule IV of the Calcutta Municipal Act of 1899. It is submitted the expression means "any person" generally. The word "individual" carries the signification of "single". It was not intended by the word to indicate that the person should be a member of or belong to the associations mentioned in the rule. The object of the Act was to provide that only one person should be nominated by an association to represent it for voting purposes, and not more than one. But any person could be so appointed. It was not intended to limit the selection of the representatives to the members of which the associations were composed. It is significant that in rule 10, sub-clause 9, the word "person" should have been used and not "member", indicating thereby that the Chairman could appoint any person and not

(1) (1892) I. L. R. 19 Calc. 192.

1912

NISITH C. SEN, *In re.*

necessarily a member of the groups to represent it. Again it is clear from sections 37 and 38 of the Calcutta Municipal Act that the word "person" was used in a general sense.

Mr. S. P. Sinha (with him *Mr. B. L. Mitter*), for the Chairman of the Corporation, left the matter in the hands of the Court.

Mr. B. C. Mitter (with him *Mr. S. R. Das* and *Mr. P. R. Das*), for the respondent. The appellant has no right of appeal. The order was made on the Chairman and not on the appellant. The right of the electors may be affected by the order, but not that of the appellant. The right of appeal is a creature of Statute: *Peek* v. *North Staffordshire Railway Company* (1). The appellant could have no right of appeal apart from section 48 of the Specific Relief Act, whether under section 96 of the Civil Procedure Code or under the Charter. It was a new remedy. If the Charter allowed the right of appeal in cases of this nature, it would have been unnecessary to frame Section 48. It is clear the right of appeal provided by section 48 of the Specific Relief Act would not enure for the benefit of the appellant. In rule 9 of Schedule IV of the Calcutta Municipal Act, the expression "any one individual person" must be taken as used in correlation with the preceding expression "association of individuals." The "individual" must be taken as belonging to the association. If "individual" only meant "single," the word "one" would be superfluous, and that would contravene the ordinary principle of the construction of Statutes. *In the matter of Mutty Lall Ghose* (2) was decided before the present Municipal Act was passed. It would be against the policy of the law to countenance a large number of votes being acquired by one candidate

(1) (1862) 10 H. L. 473. (2) (1892) I. L. R. 19 Calc. 192.

before even the nomination of candidates has taken place.

Mr. Chakravarti, in reply. There was no substance in the grievance that votes were acquired by one candidate before the nomination of candidates, as long before actual nomination, the candidates were in the field and their candidature was known by the electors.

JENKINS C. J. Mr. Nisith Chandra Sen, a candidate for election as a Commissioner for Ward 22 at the coming Calcutta Municipal election, obtained a rule calling on the Chairman of the Corporation of Calcutta to show cause why he should not prepare and publish the revised list of voters for Ward 22 under rule 10 of Schedule IV of the Calcutta Municipal Act by rejecting the application filed by Babu Priya Nath Mullick, a candidate for election as a Commissioner for Ward No. 22, on the 1st January 1912.

It was ordered that a copy of the order be served on Babu Priya Nath Mullick, but no rule was in express terms issued against him.

The application made by Babu Priya Nath Mullick was that his name be entered in the list as the person qualified to vote on behalf of a large number of companies, firms and Hindu families.

The rule was heard by Mr. Justice Fletcher, who made it absolute with costs.

From this order Babu Priya Nath Mullick alone has appealed. The Chairman of the Corporation has not appealed, nor has his counsel addressed the Court in support of the appeal or complained of the order made by Mr. Justice Fletcher.

It is objected by the respondent at the outset that Babu Priya Nath Mullick has no right to appeal, as

1912

NISITH C. SEN, *In re.*

JENKINS C.J.

the order was not against him but against the Chairman of the Corporation.

But it is further urged that whether an appeal lies or not the order of Mr. Justice Fletcher was correct and it is on this that an expression of our opinion has been specially invited.

The proposition for which Mr. Nisith Sen contends is formulated in paragraph 5 (*a*) of his petition in these terms: "That the said Priya Nath Mullick being a person foreign to the body corporate, joint Hindu family or firm, as the case may be, could not be authorised by such corporations, Hindu joint family or firm to represent such corporation, Hindu joint family or firms inasmuch as such authorisation contravenes the provision of rule 9 of Schedule 4 of the Calcutta Municipal Act."

He further urges that if Babu Priya Nath Mullick's application be upheld he will be considerably prejudiced at the ensuing municipal election.

Nor can there be any doubt as to this, for if Babu Priya Nath Mullick's contention be upheld, then he will, according to his contention, be armed with no less than 571 votes which he will be entitled to use in favour of his own candidature. This, if the true view, is a concentration of voting power in one person which it is impossible to regard with favour, and it is difficult to suppose that the framers of the Act and the rules under the Act could have intended such a result.

But do the rules on their true construction support Babu Priya Nath Mullick's contention? Mr. Justice Fletcher has held, not, and I see no sufficient reason for dissenting from this view.

The governing rule is the 9th of those in Schedule IV to the Act, and I think it may fairly be said that the expression "any one individual person" there

found should be read together with, and controlled by, the expression "association of individuals" which immediately precedes it.

So read, the field of selection for representation would be limited to those individuals of which the several associations there indicated are composed.

This view of the rule would account for the somewhat unusual expression "any one individual person" which would have been unnecessary had the words borne the unlimited significance for which Babu Priya Nath Mullick contends.

It, moreover, gains support from other parts of the rules, and at any rate provides a safeguard against that plurality of votes claimed by Babu Priya Nath Mullick.

In the view I take, it is unnecessary to pronounce any opinion on the competence of the appeal, for in any case it must fail, and the costs be paid by the appellant.

WOODROFFE J. The point appears to me to be clear, though doubtless it might have been rendered more so by the insertion of the word "members" as has been done in rule 4 (*4*), in which case the question before us would not have arisen. The question turns upon the meaning of the words "any one individual person" in rule 9. The words "any person" would have satisfied the construction for which the appellant contends, unless, as it is also urged on his behalf, the words "one individual" were necessary to exclude the juristic or artificial persons included in the term "person" by rule 1. Under that rule the word "person" includes a company, body corporate, firm, Hindu joint family and other association of individuals. I stop here to point out in connection with the words "other association of individuals" that throughout the rules companies, bodies corporate, etc.,

1912

NISITH C. SEN, *In re.*

WOODROFFE J.

are, whether they be correctly defined as such or not, treated as associations of individuals. And the marginal note of rule 9 under discussion runs "representation of association of individuals." As the word "individual" is used in the rules correlatively with association it appears to me to be a strong argument against the appellant that the words "one individual" should appear in rule 9 unless it can be shown that they were necessary to exclude the wider meaning assigned to the term "person" by rule 1. Under that rule, however, "person" only includes a juristic person if there be no repugnancy in the context. The words "one individual" were clearly not necessary to exclude juristic persons. In the first place, if there were nothing else, one company or body corporate cannot vote for another. Further, we find the words "any one individual person" may "apply that his name be entered," wording which is obviously inapt if the person previously spoken of includes bodies corporate. Further, the application is that the name be entered not only as the person qualified to vote but also to be elected, a circumstance which goes to show that the person spoken of is a member of the association to be represented. In my opinion therefore the words "one individual" were not necessary to exclude juristic persons under rule 1 and are therefore surplusage unless some other force be given to them. They were in my opinion used to show that the person who was competent as a representative was a person who was an individual or member of the association to be represented. It has been said that difficulties might arise on this construction with reference to companies and body corporate. It is not necessary to decide that case, but dealing with the argument before us I do not see that creates a difficulty. For the members of a company would

be its share-holders and of a corporate body such persons as are defined as such by the Act or Statute incorporating it. Further, I consider it to be a strong argument against the appellant's contention that the term individual in rule 9 and in rule 10 (9) must be read in the same sense, and, if so, the incongruous results follow which are indicated in Fletcher J.'s judgment. Lastly, it is of great weight against the appellant's construction that it is contrary to public policy and detrimental to the public interest. It is not in conformity with such interest that persons should give their votes without reason to some stranger before even the nomination of candidates and that such candidate should go to the poll with a large number (in this case nearly 600) of votes in his pocket to be cast by him in favour of his own candidature. I reserve my opinion on the question of the right of appeal as it is not necessary to deal with the point. I agree, therefore, that the appeal should be dismissed with costs.

Appeal dismissed.

Attorneys for the appellant : *G. C. Chunder & Co.*

Attorney for the respondent : *K. K. Dey.*

Attorney for the Chairman of the Corporation : *M. L. Sen.*

J. C.

APPELLATE CIVIL.

Before Justice Sir Cecil Brett and Mr. Justice Carnduff.

1912

Feb. 29.

HARISH CHANDRA TEWARY

v.

CHANDPUR COMPANY, LD.*

Appeal to Privy Council—Limitation—Period between the signing of the judgment and the decree, how far allowed to be calculated in saving limitation in filing Privy Council appeal—Limitation Act (IX of 1908), ss. 5, 12, Sch. I, Art. 179.

Where the appellant to His Majesty in Council has failed to apply for a copy of the judgment and decree within the period allowed for filing the appeal, he cannot be allowed to say that he was prevented from filing the application in time by reason of the decree not being signed; and he is not entitled to ask the Court under s. 12 of the Limitation Act to deduct the period between the signing of the judgment and the signing of the decree in computing the period of limitation for appeal to His Majesty in Council.

Bechi v. *Ahsan-ullah Khan* (1) relied on.

Bani Madhub Mitter v. *Matungini Dassi* (2) distinguished.

APPLICATION for leave to appeal to His Majesty in Council by the plaintiff.

The judgment appealed against was delivered on the 7th July 1911. The application for leave was made on the 30th January 1912, that is, more than 23 days after the period of six months allowed by the Limitation Act to file a Privy Council appeal. The appellant contended that the period of 23 days beyond six months did not bar the appeal, as the decree was signed about a month after the delivery of the judgment, and that under the provisions of the new

* Application for leave to appeal to His Majesty in Council, No. 6 of 1912.

(1) (1890) I. L. R. 12 All. 461. (2) (1886) I. L. R. 13 Calc. 104.

Limitation Act of 1908, he was entitled to get the benefit of the period between the signing of the judgment and the decree in computing limitation.

Babu Karunamoy Bose, for the petitioner. It is true application for copy of the judgment and decree was not made till the 26th January 1912, but I am now entitled to have six months, and the period between the signing of the judgment and the decree to file the appeal. Under the old Limitation Act, time taken for copy of judgment and decree was not allowed. It is now allowed under section 12 of the new Limitation Act. Supposing I had applied for copy of judgment and decree as soon as the judgment was delivered, I would not have got them for a month almost. If, however, that period is not allowed, I should have the delay excused under section 5, as this is the first case after the passing of the new Act. The principle of the case of *Bani Madhub Mitter* v. *Matungini Dassi* (1) is applicable. The later Allahabad case, *Bechi* v. *Ahsanullah Khan* (2), lays down no sound rule of law.

Babu Jogesh Chandra Roy, for the opposite party, contended that the petitioner was guilty of laches, and not entitled to have the special favour of the Court.

Cur. adv. vult.

BRETT J. The value of the property in the suit in respect of which this application is made for leave to appeal to His Majesty in Council is Rs. 21,206-10. The decisions of the two Courts are however concurrent, and it will therefore be necessary for the applicant to satisfy us that his appeal raises a substantial question of law.

(1) (1886) I. L. R. 13 Calc. 104. (2) (1890) I. L. R. 12 All. 461.

1912

HARISH CHANDRA TEWARY v. CHANDPUR COMPANY, LD.

BRETT J.

The question, however, which we have to determine first is whether the application has been made within the time limited by the law, or whether it is barred by limitation.

The judgment of this Court, against which the applicant seeks to appeal, was delivered on the 7th July 1911, and the application was made on the 30th January 1912, that is to say after an interval of six months and 23 days. The period fixed by Article 179, Schedule I of the Limitation Act (IX of 1908), within which such an application should be made, is six months from the date of the decree appealed against, and, unless the applicant is able to make out a case to avoid the bar of limitation, his application must necessarily be dismissed.

The case put forward by the appellant is as follows: Though the judgment of this Court was delivered on the 7th July 1911, he says that the decree which, as required by Order XX, rule 7, bears the same date as the judgment, was, in fact, not signed till about a a month afterwards, and he has filed in support of his application an affidavit, the second paragraph of which runs as follows:—

"That the decree was prepared and signed by the Hon'ble Judges after about a month of the same (the date of the judgment, the 7th July, 1911), and the decree, duly prepared and signed, was received by the Peshkar from the Bench Clerk on the 8th August 1911, and it was not till then that the decree was available for taking copies of the same."

The applicant relies on section 12 of the Limitation Act (IX of 1908) and on the Full Bench decision of this Court in the cases of *Bani Madhub Mitter* v. *Matungini Dassi* (1) to support the contention that the

(1) (1886) I. L. R. 13 Calc. 104.

application, having been made within six months from the date when the decree was signed, was in time.

In dealing with the affidavit we have to observe that it is not precise as to the date on which the decree was signed, nor does it explain the circumstances under which the decree was not available for the purpose of preparing a copy of it till the 8th August, nor what proof the applicant had that such was the fact.

Application for a copy of the judgment and decree was not made till the 26th January 1912, that is to say, till more than six months from the date of the judgment, and the copy was delivered the same day.

It cannot, therefore, be urged that in this case the applicant was prevented from obtaining a copy of the decree before the 8th August, for in fact he made no effort to obtain a copy till the 26th January following.

Only one day's delay having occurred in furnishing the copy of the decree, section 12 of the Limitation Act by itself cannot assist the applicant to avoid the bar of limitation.

The Full Bench decision of this Court, on which the applicant relies, dealt with the question of limitation under section 12 of the Act as affecting appeals from decrees passed by two Munsifs in 1886. In that year the coresponding provision in the old Limitation Act of 1877 did not apply to applications for leave to appeal otherwise than as a pauper, and therefore did not apply to applications for leave to appeal to His Majesty in Council, and the judgment of the Full Bench at the time of its delivery certainly did not, and could not be taken to, apply to such applications.

It must also be noticed that before the delivery of that judgment the date of the signing of the decree had to be entered by Judges of the lower Courts in the

1912

HARISH CHANDRA TEWARY v. CHANDPUR COMPANY, LD.

BRETT J.

order sheet in accordance with the rules of the High Court, and after that judgment had been delivered, in order to assist further the Appellate Court, instructions were issued by the High Court to the Subordinate Courts directing the Judges of those Courts to note on the decree itself the date when it was signed. In those Courts, therefore, there was and is a definite record of the date when the decree is signed.

In that judgment the Full Bench held as follows:

"In our opinion the fact that the decree was not in existence, that is signed by the particular Judge, and could not therefore be copied until 23rd July, that is six days after the date that it bears (*i.e.*, the date of the judgment), entitles the appellant to ask us to deduct those six days in addition to the eight days (delay which occurred in obtaining a copy of the decree), and thus to hold that under section 12 of the Limitation Act the appeal has been presented within the prescribed period."

The contention advanced on behalf of the appellant is that, since section 12 of the Limitation Act has been made applicable to applications for leave to appeal to His Majesty in Council, that decision must be taken to apply to such applications as well as to appeals against the decrees of the Subordinate Civil Courts, and that it entitles the applicant to claim a deduction of the days intervening between the delivery of judgment and the signing of the decree. In the present case if such an allowance be made, the application would apparently be in time.

In the case of *Bechi* v. *Ahsan-ullah Khan* (1) a Full Bench of the Allahabad High Court in dealing with the effect of section 12 of the Limitation Act held that "in computing the time to be excluded under section 12 of the Limitation Act from a period of limitation the

(1) (1890) I. L. R. 12 All. 461.

time requisite for obtaining a copy does not begin until an application for copies has been made. If, therefore, after judgment the decree remains unsigned, such interval is not to be excluded from the period of limitation unless, an application for copies having been made, the applicant is actually and necessarily delayed through the decree not having been signed." Dissent was then expressed from the decision of the Full Bench of this Court in the case of *Bani Madhub Mitter* v. *Matungini Dassi* (1).

In this High Court the practice before the passing of the new Limitation Act was in accordance with the law to apply strictly the rule of limitation, and not to make any allowance for the time occupied even in obtaining copies of the decrees. Since the passing of the new Act allowance for that period must now be made, and this has been so held by this Court by its order delivered on the 6th February 1912 in the case of the application for leave to His Majesty in Council, No. 102 of 1910.

But in this Court there is no rule providing that the dates of signing the decrees shall be noted by the Judges on them at the time of signing, so that there is in fact no definite record from which the date when a decree is signed can be accurately ascertained. To extend the application of the Full Bench ruling of this Court to applications for leave to appeal to His Majesty in Council in existing circumstances would have the result of indefinitely extending the period of limitation, for there would be no record by which its limit might be ascertained.

There is too a marked point of distinction between the facts of the case now before us and the facts of the cases which were before the Full Bench of this Court in 1886. In one of those cases the application for

(1) (1886) I. L. R. 13 Calc. 104.

1912

HARISH CHANDRA TEWARY v. CHANDPUR COMPANY, LD.

BRETT J.

copy had been made before the decree had been signed, and in both cases the applications for copies had been made before the period of appeal, reckoned from the date of the judgment, had expired. In the case now before us the application for the copy of the judgment and decree was not made till after the expiry of six months from the date of the judgment, that is to say till after the period of limitation, if reckoned from the date of the judgment, had expired.

The Full Bench of this Court, in dealing with the question of limitation in 1886, considered what would be the effect if the decree were not signed till after the period of limitation had expired, but did not consider that would be the effect if the appellants had taken no steps to obtain copies of the decrees within the period of limitation.

This point was considered by the Full Bench of the Allahabad Court, and appears to be of considerable importance in the appeal before us.

In dealing with that point the Allahabad Court held that the appellant was only entitled to be excused under section 12 of the Limitation Act for a delay for which he was not himself responsible, and that appears to be the principle underlying that section.

We are not prepared to hold that the judgment of the Full Bench relied on by the appellant is a binding authority on us in the present case.

We are of opinion that in the present case the applicant is not entitled to ask us under section 12 of the Limitation Act to deduct the period which expired between the signing of the judgment and the signing of the decree, because he, having failed to apply for a copy of the judgment and decree within the period of limitation, cannot be allowed to say that he was prevented from filing the application in time by reason of the fact that the decree was not signed.

The applicant further asks us to admit the appeal under the provisions of section 5 of the Limitation Act. His case is that he was misled by the judgment of the Full Bench of this Court into the belief that he would be allowed under section 12 of the Act to ask for a deduction of the period which elapsed between the date when the judgment was delivered and the date when the decree was signed. As this is the first occasion on which that point has been raised and there are grounds to support the contention that he was so misled, we think that in the circumstances we may accept this contention and under section 5 of the Act allow an extension of the period of limitation to cover the time between the date of the judgments and the date of signing the decree. At the same time we desire to say that we grant this concession with considerable hesitation.

CARNDUFF J. I agree. The Full Bench decision of this Court on the construction of section 12 of the Limitation Act must, I think, be distinguished on the ground that the rule which it lays down in respect of appeals from the decrees of the Subordinate Courts is a rule which, regard being had to the circumstances and the practice here, cannot be applied to, and would surely not have been laid down by the Full Bench in connection with, appeals from the decrees of this Court. For what we have to deal with under section 12 is a matter of exact computation, and the material for making the deduction prescribed by the Full Bench for the *mufassal* is altogether wanting in this Court. But the applicant may, I think, be excused for having failed to perceive this distinction and acted on the assumption that the recent alteration in the law would have the result of giving him the benefit of the deduction. And I find that, so far as can be

1912

HARISH CHANDRA TEWARY v. CHANDPUR COMPANY, LD.

CARNDUFF J.

ascertained, the statement that the signed decree was not received from the Judges before the 8th August is correct. No doubt, it is possible that it had nevertheless been signed before the 30th July, in which event the time limited by law, even if calculated from the date of signing, would have expired before the present application was filed. But it is highly improbable that there was such delay, and, on the whole, the case seems to me to be one in which relief may, *pro hac vice*, properly be given under section 5 of the Act.

S. M.

CIVIL RULE.

Before Mr. Justice D. Chatterjee and Mr. Justice N. R. Chatterjea.

1912

March 4.

RAM CHARAN CHANDA TALUKDAR

v.

TARIPULLA.*

Sanction for prosecution—Sanction refused by Munsif—Appeal—Sanction granted by Subordinate Judge—Jurisdiction—Code of Criminal Procedure (Act V of 1898), s. 195—Civil Courts Act (XII of 1887), ss. 21 and 22—Code of Civil Procedure (Act V of 1908), ss. 24 (1) (a) and 115.

A suit having been dismissed by the Munsif and, on appeal, by the Court of Appeal, the defendants applied to the Munsif for sanction to prosecute the plaintiffs for offences under ss. 468 and 471 of the Indian Penal Code. This application was refused, but, on appeal, the Subordinate Judge granted such sanction :

Held, that the Court of the District Judge was the only Court to which such an appeal would properly lie.

Per N. R. CHATTERJEA J. For the purposes of s. 195 of the Criminal Procedure Code, a Munsif is not subordinate to a Subordinate Judge.

* Civil Rule, No. 5426 of 1911, against the order of Behari Lal Chatterjee, Subordinate Judge of Mymensingh, dated July 22, 1911.

RULE granted to the petitioners, Ram Charan Chanda Talukdar and others.

The plaintiffs, Ram Charan Chanda Talukdar and others, brought a suit on a bond in the Court of a Munsif, who dismissed the suit, and subsequently his judgment was upheld by the Appellate Court. Thereupon, the defendants applied to the Munsif to prosecute the plaintiffs for offences under sections 468 and 471 of the Indian Penal Code. The Munsif refused this application. On appeal to the District Judge, the case was transferred to the Subordinate Judge who, after hearing the appeal, reversed the order of the Munsif and sanctioned the prosecution of the plaintiffs. Thereupon, the plaintiffs applied to the High Court and obtained this Rule on the defendants to show cause why the order of the Subordinate Judge sanctioning the prosecution should not be set aside.

Babu Dwarka Nath Chuckerbutty and *Babu Kalikinkar Chuckerbutty*, for the petitioners, in support of the rule. The Court of the Subordinate Judge, by which the appeal from the order of the Munsif refusing sanction was heard, was not the Court to which such an appeal properly lay. Section 195, clause (*6*) of the Criminal Procedure Code, enacts that the refusal to grant sanction may be set aside by any authority to which the authority refusing it is subordinate, and by clause (*7*) for the purposes of section 195 every Court shall be deemed to be subordinate only to the Court to which appeals from the former Court ordinarily lie. By section 21 (*2*) of Act XII of 1887 it is declared that an appeal from an order of a Munsif shall lie to the District Judge. The Court of the District Judge, therefore, was the authority to which the Munsif was subordinate: *Sadhu Lall* v. *Ram Churn Pasi* (1).

(1) (1902) I. L. R. 30 Calc. 394.

1912

RAM CHARAN CHANDA TALUKDAR v. TARIPULLA.

Under section 195, the District Judge could act on his own initiative, and it was an error to style the application to him as an appeal from an order of the Munsif. The Munsif furthermore, has decided this case rightly in holding that the plaintiffs having merely failed to prove their case, sanction under section 195 must be refused.

Babu Akhilbandhu Guha, for the opposite party. showed cause. The High Court, I submit, cannot interfere in this case under section 195 of the Criminal Procedure Code. This is not a case in which a question of jurisdiction is involved. It is only under section 115 of the Civil Procedure Code of 1908 that the High Court does interfere in matters of this kind, provided there has been gross injustice done to one of the parties: *Hamijuddi Mondol* v. *Damodar Ghose* (1), *Ram Proshad Malla* v. *Raghubar Malla* (2), *Ramdhin Bania* v. *Sewbalak Singh* (3), *Joy Narain Jana* v. *Upendra Narain Ray* (4), *Begu Singh* v. *Emperor* (5) and *Salig Ram* v. *Ramji Lal* (6).

Moreover, the District Judge has power to transfer to any subordinate Court under his administrative control any appeals pending before him from the orders of Munsifs: see section 22 of Act XII of 1887 and section 24 (*1*) (*a*) of the Civil Procedure Code of 1908.

I submit, therefore, that the Subordinate Judge had jurisdiction, that the sanction was properly granted.

Cur. adv. vult.

D. CHATTERJEE J. In this case a Munsif dismissed a suit on a bond, and the decree was upheld by the

(1) (1906) 10 C. W. N. 1026.
(2) (1909) 13 C. W. N. 1038.
(3) (1910) I. L. R. 37 Calc. 714; 14 C. W. N. 806.
(4) (1908) 13 C. L. J. 216.
(5) (1907) I. L. R. 34 Calc. 551.
(6) (1906) I. L. R. 28 All. 554.

1912

RAM CHARAN CHANDA TALUKDAR *v.* TARIPULLA.

CHATTERJEE J.

Appellate Court. An application for sanction to prosecute the plaintiff for offences under sections 468 and 471 of the Indian Penal Code was refused by the Munsif. From this order an appeal was preferred evidently to the District Judge: this appeal was heard by the Subordinate Judge, who reversed the order of the Munsif and granted sanction. The plaintiff obtained this Rule for setting aside the order of the Subordinate Judge.

It is contended by the learned Vakil for the petitioner that the Subordinate Judge had no jurisdiction to make the order that he has made, and on the merits that the order of the Munsif refusing sanction was a proper one and should not have been set aside as the Courts which decided the bond suit went upon the failure of the plaintiff to prove his case. The learned Vakil for the opposite party contends that we cannot go into the second question, as we have no jurisdiction to interfere under section 195 of the Criminal Procedure Code and the rule must be discharged, unless we uphold the first contention, in which case we may have jurisdiction under section 115 of the Civil Procedure Code. I shall deal with the first question first. Section 195, clause (*6*) of the Criminal Procedure Code, provides that "any sanction given or refused under this section may be revoked or granted by any authority to which the authority giving or refusing it is subordinate." Clause (*7*) provides that "every Court shall be deemed subordinate only to the Court to which appeals from the former Court ordinarily lie." Chapter III of the Civil Courts Act, which is headed as dealing with ordinary jurisdiction, contains section 21, of which clause (*2*) says that, "save as aforesaid, an appeal from a decree or order of a Munsif shall lie to the District Judge." The saving is in respect of any provision to the contrary in any other

1912

RAM CHARAN CHANDA TALUKDAR v. TARIPULLA.

CHATTERJEE J.

Act, and is not material in this case, as there is no suggestion that there is any such special enactment applicable to it. Clause (*4*) of section 21 provides that the High Court may under certain circumstances allow appeals lying to the District Judge to be preferred to the Court of a particular Subordinate Judge. That also is not material, as there is no suggestion that there is any such special order applicable to the present case. No appeal lay to the Subordinate Judge, and he was, therefore, not the authority which could grant or revoke a sanction refused or granted by the Munsif. It is true that under section 24, clause (*a*) of the Civil Procedure Code, the District Judge can transfer any suit, appeal or proceeding pending before him to any subordinate Court competent to try it, but the Subordinate Judge was not competent to try this appeal, as he was not the authority to which the appeal lay. The order of the Subordinate Judge was, therefore, incompetent.

As regards the second question, there is some conflict of authority. The Allahabad High Court has held that under section 195, clause (*6*), there can be only one proceeding by way of appeal from an order giving or refusing a sanction, and as soon as the Appellate Court makes an order either way, there is no further appeal: see *Emperor* v. *Serhmal* (1), *Kanhai Lal* v. *Chhadammi Lal* (2). The Madras High Court has decided that an appeal lies to the High Court not only in cases where the first Court refuses sanction and sanction is granted by the Court to which that Court is immediately subordinate, but also in cases where the first Court grants sanction and the sanction is revoked by the Court to which that Court is immediately subordinate: see *Muthuswami Mudali* v.

(1) (1908) All. W. N. 102.

(2) (1908) I. L. R. 31 All. 48.

912

RAM CHARAN CHANDA TALUKDAR v. TARIPULLA.

CHATTERJEE J.

Veeni Chetti (1). The learned Judges differ from the Calcutta ruling in *Hamiruddi Mondol* v. *Damodar Ghose* (2) and agree with two subsequent Calcutta rulings, *Habibur Ra aman* v. *Munshi Khodabux* (3), *Girija Sankar Ray* v. *Binode Sheikh* (4). The same point was raised in the case of *Ram Proshad Malla* v. *Raghubar Malla* (5), but the learned Judges, whilst expressing an inclination in favour of the Madras view, supported as it was by some of the Calcutta cases, preferred to interfere under section 622 of the old Civil Procedure Code. It is not necessary, however, to pursue this question further, as our view on the first question is sufficient to dispose of this Rule.

The Rule is accordingly made absolute. We make no order as to costs.

N. R. CHATTERJEA J. I agree with my learned colleague in making the Rule absolute.

Under section 21, sub-section (*2*) of the Bengal, North-Western Provinces and Assam Civil Courts Act, an appeal from a decree or order of a Munsif ordinarily lies to the District Judge, and not to the Subordinate Judge. There is no suggestion in this case that there is any special order as provided for in sub-section (*4*) of that section, under which appeals could have been preferred to the particular Subordinate Judge who passed the order on appeal in the present case. Under section 22 (*1*) a District Judge no doubt may transfer to any Subordinate Judge under his administrative control any appeals pending before him from the decrees or orders of Munsifs. When an appeal transferred under section 22 (*1*) is withdrawn by the District Judge, he may either dispose

(1) (1907) I. L. R. 30 Mad. 382.
(2) (1906) 10 C. W. N. 1026.
(3) (1906) 11 C. W. N. 195.
(4) (1906) 5 C. L. J. 222.
(5) (1909) I. L. R. 37 Calc. 13 ; 13 C. W. N. 1038.

1912

RAM CHARAN CHANDA TALUKDAR v. TARIPULLA.

CHATTERJEE J.

of it himself or transfer it to a Court under his administrative control—competent to dispose of it. The question of competency to dispose of an appeal does not arise when an appeal is transferred in the first instance to a Subordinate Judge under section 22 (*1*), and it seems, therefore, that a Subordinate Judge is competent to dispose of any appeal pending before the District Judge and transferred by him to the former.

But under section 195, sub-section (*6*) of the Criminal Procedure Code, the power of revoking or granting any sanction given or refused is given to the authority to which the authority giving or refusing it is subordinate, and sub-section (*7*) provides that *for the purposes of this section* every Court shall be deemed to be subordinate *only* to the Court to which appeals from the former Court ordinarily lie. There is no doubt that the District Judge is the only Court to which appeals from an order of a Munsif ordinarily lie. For the purposes of section 195 of the Criminal Procedure Code, therefore, a Munsif is not subordinate to a Subordinate Judge. A Subordinate Judge can dispose of any appeal transferred to him by the District Judge under section 22 (*1*) of the Civil Courts Act, but the power of revoking or granting sanction is given only to the Court to which an appeal lies. The power, therefore, cannot be exercised by a Subordinate Judge to whom an appeal does not lie, but who can only dispose of an appeal transferred to him by the District Judge.

In this view of the matter, the other questions raised in this Rule need not be considered.

O. M. *Rule absolute.*

CRIMINAL REVISION.

Before Mr. Justice Holmwood and Mr. Justice Sharfuddin.

KUDRUTULLA

v.

EMPEROR.*

1912*

March 4.

Rioting—Charge—Offence—Common object—Necessity of stating the common object in the charge under ss. 143, 147 and 149 of the Penal Code—Effect of omission to state the common object—"Succeeded by another Magistrate," meaning of—Criminal Procedure Code (Act V of 1898), ss. 221, 223, 350.

An offence can be legally described by its specific name in the charge, and the question whether any further particulars are necessary under s. 223 of the Criminal Procedure Code is a question of discretion according to the circumstances of each case.

In cases of rioting the common object should be stated in the charge, but omission to state it, under ss. 143 and 147 of the Indian Penal Code, does not vitiate a conviction if there is evidence on the record to show it. It is otherwise with a charge under s. 149, Indian Penal Code, for, then, there is no specific name for the offence, and the fact that any offence is committed in prosecution of the common object is of the essence of the case, and there could be no conviction for any offence committed with a different object. It is obligatory to set out the common object in a charge under s. 149, unless it has already been specified in the main charge under s. 147.

Basiruddi v. *Queen Empress* (1) referred to.

The words "succeeded by another Magistrate" in s. 350 of the Criminal Procedure Code should not be construed in a narrow sense, but should be interpreted to mean—ceases to exercise jurisdiction in the particular enquiry or trial, and not in the particular post.

Thakur Das Manjhi v. *Namdar Mundul* (2), *Emperor* v. *Purshottam Kara* (3), referred to.

Mohesh Chandra Saha v. *Emperor* (4) and *Ali Mahomed Khan* v. *Tarak Chandra Banerji* (5) followed.

* Criminal Revision, No. 211 of 1912, against the order of Raj Krishna Banerjee, Sessions Judge of Rangpur, dated Jan. 17, 1912.

(1) (1894) I. L. R. 21 Calc. 827.
(2) (1875) 24 W. R. Cr. 12.
(3) (1902) I. L. R. 26 Bom. 418.
(4) (1908) 12 C. W. N. 416.
(5) (1908) 13 C. W. N. 420.

1912

KUDRUTULLA v. EMPEROR.

Queen-Empress v. *Radhe* (1), *Deputy Legal Remembrancer* v. *Upendra Kumar Ghose* (2) not followed.

THE facts are shortly these. The complainant Nasiruddin and one Ibrahim were the joint *ijaradars* of Shayampur *hât*. On the 8th of August, an up-countryman, living at the house of the accused Kudrutulla, went to the *hât* to sell lemons. The *ijaradars* took two lemons as toll from him. Kudrutulla protested against this, and there was a scuffle between Kudrutulla on the one hand and Ibrahim and the toll-collector amin on the other.

On the 12th of August, the next *hât* day, Kudrutulla came, accompanied by 15 or 20 men, armed with *lathis* and assaulted the complainant, his friends and relatives.

At 12 P.M. on the 12th of August the complainant lodged the first information. The accused were, thereupon, put upon their trial. The case came on for hearing before Babu B. N. Mukerjee, Deputy Magistrate of Rangpur, who examined the prosecution witnesses and framed charges against the accused under sections 147, 323 and 142, Indian Penal Code.

On the 18th of November 1911 the case came on again for hearing; but the Deputy Magistrate having no time to give to the case, the District Magistrate, upon the application of the defence, transferred the case to the file of Moulvi Choinuddin, another Deputy Magistrate who took up the case at the stage it was left by his predecessor.

On the 19th of November the case was adjourned for the cross-examination of prosecution witnesses and for defence.

On the 27th of November the defence filed a list of three witnesses whom they wanted to examine, but

(1) (1889) I. L. R. 12 All. 66. (2) (1906) 12 C. W. N. 140.

the Deputy Magistrate rejected the application as having been filed "too late."

On the 1st of December some witnesses were examined for the defence, and on the 4th the Deputy Magistrate convicted the accused under sections 147, 323 and 149 of the Penal Code.

Against this order the accused Kudrutulla and others appealed to the Sessions Judge of Rangpur, who dismissed their appeals. Thereupon the petitioners moved the High Court and obtained this Rule.

Mr. Donogh and *Babu Manmatha Nath Mukherjee*, for the petitioners.

No one appeared for the Crown.

HOLMWOOD AND SHARFUDDIN JJ. This was a Rule calling upon the District Magistrate of Rangpur to show cause why the convictions and sentences passed on the petitioners should not be set aside on three grounds.

The first ground is that the charge was defective, inasmuch as no common object was specified therein. The second ground is that there should have been a *de novo* trial, the right to it never having been waived. The third ground is that the learned Deputy Magistrate should not have rejected the accused's prayer of the 27th November for calling for three witnesses who would have proved the entire falsity of the prosecution story.

The case was a very simple and ordinary one, and though there may have been technical defects, we do not think any of the irregularities alleged have caused any prejudice to the accused persons. The complainants are joint *iiaradars* of a certain *hât*, and one of them got into an altercation and scuffle with one Kudrutulla, a lemon-seller, on the 8th August. The next *hât* day, the 12th August, Kudrutulla brought 15 or 20 men with

1912

KUDRUTULLA v. EMPEROR.

him armed with bamboo *lathis* and attacked and wounded the complainant and his friends and relations.

As regards the defect in the charge the law is clear, that as regards the offence of rioting the offence can be legally described by its specific name, and the question whether any further particulars are necessary under section 223 of the Criminal Procedure Code must be a question of discretion according to the circumstances of each case.

It has been laid down in numerous rulings of this Court that in cases of rioting the common object should be stated in the charge [*Basiraddi* v. *Queen-Empress* (1)], but the omission to state it under sections 143 and 147 does not vitiate a conviction if there is evidence on the record to show it.

In this case the common object was obvious from the charge sheet and the evidence, and it has been found to be that the accused Kudrutulla, his cousin and his neighbours combined together and formed an unlawful assembly to assault the complainant and his men. We think, as a matter of law, it is otherwise with a charge under section 149 of the Penal Code. Then there is no specific name for the offence, and the fact that any offence is committed, in prosecution of the common object, is of the essence of the case and there could be no conviction for any offence committed with a different common object. It is therefore in our opinion obligatory to set out the common object in a charge under section 149, unless it has been already specified in the main charge under section 147.

We therefore make the rule absolute so far as the convictions under sections 149 and 323 are concerned, and set them aside together with concurrent sentences passed thereunder. And in any case the common object being clearly to assault with *lathis* and to cause

(1) (1894) I. L. R. 21 Calc. 827.

hurt, there could not be separate sentences for what is practically one offence. As regards the second point we are confronted with what appears to be a conflict of rulings. In the case of *Queen-Empress* v. *Radhe* (1), it was held that this section was intended to provide for a case where an inquiry or trial has been commenced before one incumbent of a particular post and that officer ceases to exercise jurisdiction in that post and is succeeded by another officer. This clearly goes beyond the law as laid down in section 350, the words being "ceases to exercise jurisdiction therein," that is, in the enquiry or trial, and not, as the Allahabad ruling would imply, in a particular post. The words "succeeded by another Magistrate" have however been read as importing that the first Magistrate must have left his post, but it has been held in two rulings of this Court [*Mohesh Saha* (2) and *Ali Mahomed Khan* (3)] that the word "succeeded" should not be construed in the narrower sense.

No doubt such a narrow construction was incidentally put upon it by a Bench of this Court in the case of *Deputy Legal Remembrancer* v. *Upendra Kumar Ghose* (4) to which one of us was a party, but the question did not directly arise in that case and the facts clearly show that the irregularity in that case caused prejudice to the accused person. On a consideration of these cases we are of opinion that the later rulings are direct authority on this particular point and are binding on us. We do not therefore consider it necessary to refer the point of law to a Full Bench.

The facts of this case entirely remove the matter from any question of prejudice. It appears that learned counsel was brought down from Calcutta for

(1) (1889) I. L. R. 12 All 66.
(2) (1908) 12 C. W. N. 416.
(3) (1908) 13 C. W. N. 420.
(4) (1906) 12 C. W. N. 140.

1912

KUDRUTULLA v. EMPEROR.

the express purpose of cross-examining certain prosecution witnesses. He had only that day and the next at his disposal, and the trying Magistrate was unable to take up that case on those days. He therefore applied to the District Magistrate to allow the case to be heard before another Magistrate, waiving the right to a *de novo* trial. Had the Magistrate who succeeded to the jurisdiction felt himself obliged to reopen the case from the beginning, the object of the accused in bringing down counsel and asking for the transfer would have been frustrated. It is argued that the transfer was under section 528, and that section 350 has no application, but we think that this is now concluded by the authorities we have cited. The District Magistrate did not apparently withdraw the case to his own file. He accepted the position that Babu Bhujendra Nath Mukerjee had ceased to exercise jurisdiction in the case by reason of his being occupied in some other work, and appointed another Magistrate to take charge of the case. The leading case of *Thakur Das Manjhi* v. *Namdar Mundul* (1), in which it was held that it must be shown that the accused person has been prejudiced by the order of the succeeding Magistrate acting on evidence entirely recorded by his predecessor has never, as far as we know, been overruled. Here the entire case for the defence, including the cross-examination of prosecution witnesses, was held before the second Magistrate, and the defence was therefore placed in a far more favourable position by reason of the case being unavoidably heard in its later stages by the second Magistrate.

We find that the second ground upon which the Rule was issued fails. As to the third ground we find that a petition was put in to summon three witnesses,

(1) (1875) 24 W. R. Cr. 12.

two of whom were railway servants, three days before the date fixed for final hearing. These witnesses were to prove that the first information was not given to the Sub-Inspector in the Railway station at midnight on Saturday, but was drawn up after consultation with a mukhtear named Nasiruddin at midday on Sunday.

Now it is fully established that the Sub-Inspector saw the wounded men and recorded evidence on Saturday afternoon and evening. Even, therefore, if the formal first information report was not drawn up till Sunday, there would be nothing against the case for the prosecution. Information had been given to the Police on Saturday afternoon, and they had acted on it. The Sub-Inspector says that he recorded it in a private room in the station which was locked and where no Railway official was present. The witnesses on the first point, therefore, could only speak to a negative which would not under the circumstances be of much value. As regards the second point, the Sub-Inspector freely admitted that he spent the night at the house of Nasiruddin mukhtear and discussed the case with him. The defence therefore had in its hand all that it required to make the point now taken. It was taken before the learned Judge in appeal and fully dealt with by him. As regards the mandatory provisions of section 257 of the Criminal Procedure Code, on which much stress is laid before us, we are of opinion that the recording on the petition "Too late" amounts to a refusal of the application on the ground of delay, and in this case it is clear that the Magistrate was fully justified in considering that the application which ought to have been made long before, certainly not later than 19th November, was made for the purpose of delay.

The case had been dragging on since the 6th September, the occurrence having been on the 12th August.

1912

KUDRUTULLA v. EMPEROR.

It was a petty case which should have been disposed of in two short sittings, and the attitude of the defence throughout has clearly not been that of persons desirous of expediting the course of justice.

The question of the recording of the first information was fully known to the accused from the first. It was raised for the first time on the 1st December in cross-examination of the Sub-Inspector, and this although all three accused had had an opportunity of making a statement in their defence on the 18th October and had not hinted at such a defence. They then said they would file a written statement, but do not appear to have done so. Even if the Magistrate had not recorded his reasons for refusing the application, we should have felt very disinclined to interfere in revision, as the fact that the application was made for the purpose of delay is clear from the record and the order sheet, and the evidence was unnecessary and unavailing.

But under the circumstances we think the Magistrate's reasons, though irregularly recorded, are a sufficient compliance with section 257, Criminal Procedure Code; and while we have no desire to minimize the importance of a strict compliance with that section, as laid down in the case of *Emperor* v. *Purshottam Kara* (1), we do not think that any rule of law should be wrested to defeat the ends of justice, and in the exercise of our discretionary powers in revision we think this is a case where substantial justice has been done, and there is no need for our interference.

The Rule is discharged. The petitioners will surrender to their bail and serve out the rest of their sentences.

S. K. B. *Rule discharged.*

(1) (1902) I. L. R. 26 Bom. 418.

APPEAL FROM ORIGINAL CIVIL.

Before Sir Lawrence H. Jenkins, K.C.I.E., Chief Justice, and Mr. Justice Woodroffe.

GALSTAUN

v.

HUTCHISON.*

1912.

March 18.

Acknowledgment—Unstamped acknowledgment, whether acknowledgment of debt—Stamp Act (II of 1899), Sch. 1, Art. 1—Evidence—Limitation Act (IX of 1908), s. 19—Stamp duty.

In an account between the parties headed "Account current," kept by the plaintiff, the defendant was debited with advances made by the plaintiff, together with interest on sums due from time to time, and credited with payments made by the defendant, the balances being carried forward half yearly. On the account being adjusted and stated, a certain sum E. & O. E. was shewn due by the defendant : the plaintiff appended the words "I accept this correct," and the defendant subscribed his signatnre thereto. The account was continued, the said sum being carried forward, and further sums were debited to the defendant, but there were no further items of credit :

Held, that, in the circumstances of the case, the instrument was not an acknowledgment of debt within the meaning of Art. 1 of Sch. I of the Stamp Act, and was admissible in evidence without being stamped.

Brojender Coomar v. *Bromomoye Chowdhrani* (1), *Brojo Gobind Shaha* v. *Goluck Chunder Shaha* (2), and *Nund Kumar Shaha* v. *Shurnomoyi* (3), followed.

APPEAL by the plaintiff, John Carapiet Galstaun, from the judgment of Chitty J.

This appeal arose out of an undefended suit in which the plaintiff sought to recover from the defendant William O'Brien Hutchison the sum of Rs. 58,932-1-3 alleged to be due on an account stated.

* Appeal from Original Civil, No. 7 of 1912, in suit No. 694 of 1911.

(1) (1878) I. L. R. 4 Calc. 885. (2) (1882) I. L. R. 9 Calc., 127.
(3) (1887) I. L. R. 15 Calc. 162.

1912

GALSTAUN v. HUTCHISON.

Since the 25th August 1905 there were various dealings and transactions between the parties, and it was agreed that the defendant should pay to the plaintiff interest at the rate of 9 per cent. per annum on all sums which may be due to the plaintiff from time to time. An account of the transactions was entered and kept by the plaintiff, and every half year balances were carried forward. The account was headed "W. O'B. Hutchison in account current with J. C. Galstaun." On the left hand side of the account were entered various sums debited to the defendant, whether in respect of actual payments or charges for interest, and, on the right, sums credited to the defendant in respect of payments which he made from time to time on account of principal and interest.

The last item credited to the defendant was dated the 7th January 1908.

On the 1st September 1908 the account was adjusted and stated between the parties showing a balance of Rs. 45,039-9-3 E. & O. E. due to the plaintiff. At the foot of this account, and against the balance as it stood on the 1st September, appeared the words "I accept this correct" written by the plaintiff and signed and dated by the defendant as follows: "W. O'B. Hutchison, 10th September 1908." This acknowledgment was not stamped.

The account was continued, the debit balance of the 1st September 1908 being carried forward. Three further items of Rs. 748-8 each were debited to the defendant's account, being premia paid on a policy on his life during 1910 and 1911; and a fourth item of interest was debited to his account on the 30th June 1911, on which date the account was struck showing the sum of Rs. 58,932-1-3 due from the defendant to the plaintiff.

1912

GALSTAUN v. HUTCHISON.

The suit was instituted on the 6th July 1911; the defendant entered appearance through his attorneys, but failed to present a written statement. The suit was accordingly transferred to the list of undefended causes, and came on for hearing on the 26th January 1912 before Chitty J. The defendant did not appear. The plaintiff was called, and with reference to the words "I accept this correct" appearing in the account, and the defendant's signature thereto, he stated: "I took the acknowledgment so as not to worry for accounts in future. I suppose I took it to use when the time came as I am now doing. It did not strike me at the time this document was taken with the object of supplying evidence." Chitty J. passed a decree in the plaintiff's favour for the three several sums of Rs. 748-8 with interest thereon, and refused the rest of the plaintiff's claim as being barred by limitation, the acknowledgment of liability appearing on the account and dated the 10th September 1908 being held to be an acknowledgment of a debt within the meaning of Article 1 of Schedule 1 to the Indian Stamp Act and so to be inadmissible in evidence in the absence of an anna stamp. His Lordship's judgment was as follows:—

"This is a suit filed by the plaintiff to recover from the defendant a sum of Rs. 58,932-1-3 alleged to be due for principal and interest on an account between the parties. The suit has not been defended, but I have none the less to see that the plaintiff's claim is legally sustainable. It appears that from August 1905 the plaintiff made advances to the defendant from time to time and received payments from him on account. Interest was charged on the debit balances at the rate of 9 per cent. per annum. An account was prepared by the plaintiff and submitted to the defendant on 2nd September 1908 showing a balance due from defendant up to 1st September 1908 of Rs. 45,039-9-3. This account is now produced by the plaintiff in support of his case and bears the words: 'I accept this correct' with the defendant's signature and the date—10th September 1908. The last payment made by the defendant on the account was Rs. 175 paid on 16th January 1908. The plaintiff has since made payments of certain premiums

1912

GALSTAUN v. HUTCHISON.

on behalf of the defendant, which with further interest brings the sum alleged to be due up to the amount now claimed. The question is whether this amount signed by the defendant being an acknowledgment within the meaning of article 1 of schedule 1 to the Stamp Act and being unstamped is admissible in evidence. If it is such an acknowledgment being a document chargeable with a duty of one anna, it cannot be admitted under section 35 on payment of a penalty. I am of opinion that the document clearly falls within the description in article 1 and is inadmissible in evidence for any purpose: *Mulji Lala* v. *Lingu Makaji* (1). The document in the case of *Ambica Dat Vyas* v. *Nityanund Singh* (2) relied upon by plaintiff's Counsel was of a very different nature, and there might well be a doubt in the mind of the Court whether it was written or signed in order to supply evidence of the debt. A similar doubt arose as to the document in *Bishambar Nath* v. *Nand Kishore* (3). There was no such doubt as to the document in the Bombay *case* (1), nor can there be any regarding the document before me. The plaintiff stated to me that he took the acknowledgment so as not to worry for accounts in future, and said further in answer to a question from me that he supposed it was that he might use it when the time came. His Counsel then proposed to ask several leading questions framed on remarks in the judgment of the Division Bench in *Ambica Dat Vyas* v. *Nityanund Singh* (2). But this I refused to allow, as the plaintiff's examination was then over. I have no doubt that this acknowledgment was taken by the plaintiff for the express purpose of supplying evidence of the debt, and in all respects it fulfils the description in article 1. Though every acknowledgment of a debt under this article must be an acknowledgment of liability under section 19 of the Limitation Act, the converse does not necessarily follow as is shown by the documents in the Allahabad and Calcutta cases above referred to. As stated by Garth C.J. in *Binja Ram* v. *Raj Mohun Roy* (4): 'If the defendant subscribed his name to the entry as an admission that he owed the plaintiff the sum or sums mentioned in it, there is no doubt that the Munsif is right in excluding evidence of the acknowledgment on the ground that it was not duly stamped.' That is precisely what occurred in this case.

As I must hold that the document is inadmissible in evidence and so reject it, the major portion of the plaintiff's claim is barred by limitation.

The last payment by the defendant was on 16th January 1908, and it is not alleged that the fact of that payment appears in his hand-writing. The suit was filed on the 6th July 1911. I thought that the plaintiff might possibly be saved if he could show that the defendant had been out of British India. It appears that he did go to England last year, leaving some

(1) (1896) I. L. R. 21 Bom. 201.
(2) (1903) I. L. R. 30 Calc. 687.
(3) (1892) I. L. R. 15 All. 56.
(4) (1881) I. L. R. 8 Calc. 282.

time after 5th April and returning in October. That would not be sufficient, as the last advance by the plaintiff before the alleged adjustment to the defendant was made on 10th August 1907.

The plaintiff is entitled, I think, to a decree for the three sums of Rs. 748-8 paid on the defendant's account on 22nd February and 11th August 1910 and 20th February 1911 with interest at 9 per cent. on those amounts from the respective dates of payment till to-day. The rest of his claim must fail. Costs on scale No. 2 until such time as case could be transferred and thereafter on scale No. 1 and interest on judgment at 6 per cent.

From this judgment the plaintiff appealed. The appeal was heard *ex parte*, the defendant not being represented.

Mr. J. E. Bagram (*Mr. C. E. Bagram* with him), for the appellant. There is no doubt the words "I accept this correct" followed by the signature of the defendant at the foot of the account would save limitation under section 19 (*1*) of the Limitation Act, unless it be held that the instrument was inadmissible under Article 1 of Schedule I of the Stamp Act. It is submitted, Chitty J. erred in holding that the instrument fell within the purview of Article 1 of Schedule I of the Stamp Act. A distinction must be drawn between an acknowledgment of liability and an acknowledgment of a debt. The mere fact of a document being an acknowledgment of a liability under section 19 of the Limitation Act would not bring it within the operation of Article 1 of Schedule I to the Stamp Act. All the conditions indicated in that article must be present: *Ambika Dat Vyas* v. *Nityanund Singh* (1), *Chunilal Mancharam* v. *Manishankar Atmaram* (2). The question is whether the acknowledgment was made and taken in order to supply evidence of such debt. As to whether a particular document amounts to an acknowledgment of debt or not is a question of

(1) (1903) I. L. R. 30 Calc. 687. (2) (1893) I. L. R. 18 Bom. 616.

1912

GAISTAUN v. HUTCHISON.

intention, and each case must depend on its own circumstances: *Binia Ram* v. *Rajmohun Roy* (1), *Mulji Lala* v. *Lingu Makaji* (2), the two authorities relied on by Chitty J. and so distinguishable, and *Bishambar Nath* v. *Nand Kishore* (3). The test applied in the last mentioned case was whether there was any necessity to supply evidence of the debt. In the present case there was clearly no such necessity.

The decision in *Brojender Coomar* v. *Bromomoye Chowdhrani* (4), where it was held that the document did not require to be stamped, was based on the circumstance that "the amount due varied from time to time, and depended upon the relation of the amount advanced to the amount received." This was followed in *Brojo Gobind Shaha* v. *Goluck Chunder Shaha* (5) and *Nund Kumar Shaha* v. *Shurnomoyi* (6).

The same circumstance exists in the present case. Debit balances were carried forward each half year, Even after the acknowledgment of the 1st September 1908, the account continued to run on: there were further debit entries. It is only an accident that there should be no further credit entries. All that the balance struck and adjusted on the 1st September 1908 shewed was, that there was a certain debit due from the defendant to the plaintiff *on this particular account:* there may have been other dealings between the parties not covered by this particular account, in which a larger sum may have been due from the plaintiff to the defendant. Consequently, there cannot be said to have been an acknowledgment of a *debt*. The object of the acknowledgment was to accept the particular account as correct, and not for the purpose of supplying evidence.

(1) (1881) I. L. R. 8 Calc. 282.
(2) (1896) I. L. R. 21 Bom. 201.
(3) (1892) I. L. R. 15 All. 56
(4) (1878) I. L. R. 4 Calc. 885.
(5) (1882) I. L. R. 9 Calc. 127.
(6) (1887) I. L. R. 15 Calc. 162.

1912

GALSTAUN v. HUTCHISON.

Maniram Seth v. *Seth Rupchand* (1) and *Udit Upadhya* v. *Bhawani Din* (2) were also referred to.

It was also argued that even though the instrument be held to be inadmissible, the plaintiff was entitled to a decree under Order VIII, r. 5 of the Code of Civil Procedure, on the allegations in the plaint, without any evidence, no written statement having been presented.

Cur. adv. vult.

JENKINS C.J. The plaintiff has brought this suit to recover Rs, 58,932-1-3. In his plaint he alleges that from and after the 28th August 1905 he and the defendant had various monetary dealings: that the defendant from time to time made various part payments on account of principal and interest: that on the 1st September 1908 the account was adjusted and stated between the plaintiff and the defendant showing a balance of Rs. 45,039-9-3 due to the plaintiff, and the same was admitted and signed by the defendant as correct: that thereafter further dealings took place: and that there is now due and owing from the defendant's, the plaintiff, Rs. 58,932-1-3.

The plaint was instituted on the 6th of July 1911, and as provided by Order VIII, rule I, the defendant was required to present a written statement of his defence.

The defendant entered an appearance through his attorneys, but he failed to present a written statement.

The suit was transferred from the list of defended causes to the list of undefended causes, and was heard by Chitty J, who passed a decree in the plaintiff's favour for Rs. 2,435-10-6 with interest and costs.

He, however, refused the rest of the plaintiffs' claim, not because it was not proved, but because it was

(1) (1906) I. L. R. 33 Calc. 1047. (2) (1904) I. L. R. 27 All. 84.

1912

GALSTAUN v. HUTCHISON.

JENKINS C.J.

barrred by limitation, as the document by which it was sought to gain the advantage of a fresh period of limitation did not bear an anna stamp, and so (in his opinion) was inadmissible.

From this decree the present appeal has been prepared by the plaintiff.

It is beyond dispute that the sum of Rs. 58,932-1-3 would be recoverable unless barred by limitation, and that there is an acknowledgment of liability made in writing, and signed by the defendant on the 10th of September 1908, which would be a complete answer to the bar of limitation if it can be utilized.

Chitty J. held that this acknowledgment could not be proved for want of an anna stamp, as in his opinion the instrument was an acknowledgment of a debt within the meaning of article 1 of Schedule I to the Indian Stamp Act, 1899.

For the instrument to require such a stamp, all the conditions indicated in that article must be present Though each case must depend on its own peculiar circumstances, I am unable to draw any fair distinction to the plaintiff's detriment between the present case and that which was the subject of decision in *Nund Kumar Shaha* v. *Shurnomoyi* (1), where it was held that a balance sheet prepared and signed by the defendant and showing a balance due from him was not an acknowledgment within the corresponding article of the Stamp Act of 1879.

If anything, the present instrument is more removed from the provisions of the Stamp Act, for here a balance was carried forward, errors and omissions were expressly excepted; and having regard to all the circumstances of the case, I am not satisfied that the document on which the plaintiff relies is an acknowledgment within the meaning of article 1.

(1) (1887) I. L. R. 15 Calc. 162.

Any other conclusion might, I think, lead to considerable inconvenience and detriment.

The result then is that, in my opinion, the plaintiff is entitled to the relief he seeks, and the decree of Chitty J. should be varied by passing in the plaintiff's favour a decree for Rs. 58,932-1-3 with costs of the suit as directed by Chitty J. and also the costs of this appeal.

WOODROFFE J. Learned counsel has relied on the decision in *Nund Kumar Shaha* v. *Shurnomoyi* (1). On the question whether a particular document in suit amounts to an acknowledgment of a debt one decision can hardly be an authority for another, for each case must depend on its own circumstances. The observations, however, as to the general nature of signed accounts in the three cases next mentioned are relevant to the matter before us. If, however, we look at the decision in *Nund Kumar Shaha* v. *Shurnomoyi* (1) we find nothing stated beyond this:—"We have looked at the document ourselves, and we think that it is not an acknowledgment of a debt within the meaning of article 1, Schedule I, of the Stamp Act, and we are fortified in this opinion by a decision of Mr. Justice Prinsep and Mr. Justice O'Kinealy on a very similar point in the case of *Brojo Gobind Shaha* v. *Goluck Chunder Shaha* (2)." I may note in passing that the suit in this case was brought to recover what was due on a balance or *nikash* sheet after crediting the defendant with certain amounts admitted to be due to him. It appears, therefore, that the amount of the balance sheet did not show the actual debt due by the defendant. The case as appears from the report was decided with reference to *Brojo Gobind Shaha* v. *Goluck Chunder Shaha* (2) which was stated to raise

(1) (1887) I. L. R. 15 Calc. 162. (2) (1882) I. L. R. 9 Calc. 127.

1912

GALSTAUN v. HUTCHISON.

WOODROFFE J.

a very similar point, and we must, therefore, look at the latter case. This held that the document in question was not a promissory note and did not require a stamp. Prinsep J. said:—"It is exactly of the same nature as the document which forms the subject of the suit in the case of *Broj nder Coomar* v. *Bromomoye Chowdhrani* (1)." Then citing White J.'s judgment in that case, he dismissed the appeal. We are thus taken back to the decision in *Brojender Coomar* v. *Bromomoye Chowdhrani* (1) which was the foundation for the decision in the other two cases. Now, the facts of this latter decision are not entirely the same as those before us, but as stated the observation as to the general nature of signed accounts is helpful. There a sum of Rs. 20,825 made up of seven different advances on different dates was sued for. Each advance was entered on a *hath-chitta* and was signed as it was made. The first advance was stamped, and the remaining six were not. These entries were held not to come within the Stamp Act for the following reasons:—The account had two sides, viz., one side of sums advanced, and the other of those received; the Court said "the amount due varies from time to time, and depends upon the relation of the amount advanced, to the amount received. In the present case no sum is entered under the head of 'amount received,' but that is an accident and makes no difference in considering the question as to what is the nature of the document which is offered in evidence. The intention of the parties in requiring the signature or seal of the borrowers to each sum advanced is, strictly speaking, to secure under their hands an acknowledgment that the sum is *advanc d.* Whether or not that sum is *due*, or a larger sum or a less sum, *depends upon the state of the account.*" The entries

(1) (1878) I. L. R. 4 Calc. 885.

were not intended to stand alone, in which case the Court said it might have been contended that they were acknowledgments requiring a stamp. In that case also no sum was entered under the "amount received" column, yet the Court held that to be an accident and made no difference in considering the question as to what was the nature of the document (viz., an account), which was offered in evidence. If, for instance, an account is balanced at the end of a year and is accepted as correct and a separate entry were made admitting its correctness and acknowledging the balance found to be due on that account as owing to the creditor, then I conceive that such an entry might amount to an acknowledgment within the meaning of the Stamp Act and require a stamp. The Court in such a case might perhaps reasonably infer an intention to acknowledge a debt, notwithstanding that such debt was transferred to the next yearly account. The question is, however, one of intention to be gathered from the circumstances of each case, and it is only necessary to deal with the facts before us. In the present case the words "I accept this correct" were writen by the plaintiff and signed by the defendant against the balance of the 1st September 1908 showing (errors and omissions excepted) that a sum of Rs. 45,039-9-3 appeared to be payable on that account by the defendant up to that date. It was an admission that up to that date the account was correct. This amount was carried forward in the account which was continued, and further debit entries were made after the date of the acknowledgment, for which alone the plaintiff has been given a decree. To use the language in the case last cited it was an accident that no further credit entries were made. There is nothing to show that it was intended that none were to be made or that the account should close with the acknowledgment.

1912

GALSTAUN v. HUTCHISON.

WOODROFFE J.

This accident did not, in the terms of the case cited, alter the character of the document. Balances were frequently struck during the course of the account, the last being in July, 1911. The plaintiff in his evidence stated that it did not occur to him at the time that the acknowledgment was taken with the object of supplying evidence (of the debt), but that he did it "so as not to worry for accounts in future, I suppose I took it to use it when the time came as I am now doing." The question is whether in fact the writing is now used as an acknowledgment of a debt as apart from an acknowledgment of liability, and whether it is in fact so within the meaning of the Stamp Act. It may be that as the result of such acknowledgment of liability together with the account itself and other evidence in the case the law annexes as a consequence the obligation to pay the sum against which the acceptance of the defendant appears, but from this it does not follow that the defendant intended to acknowledge that particular sum as a debt within the meaning of the Stamp Act. Further, the account was E. and O. E. Even assuming that such a provision was for the benefit of the creditor only and that the defendant, had he gone to the witness box, would have been bound by his signature (though it is by no means clear that the defendant could not also have shown that such signature was given by mistake), it may well be argued that the insertion of such proviso made the defendant's acceptance one which was conditional on the correctness of the account. Let it be supposed that an enquiry under the E. and O. E. provision disclosed that the amount shown in the balance was incorrect and that the amount due was more or less than that claimed, could it be said then that the defendant had acknowledged a "debt" when the acknowledged sum did not represent that rightly claimed. It may be

admitted that *Nund Kumar Shaha* v. *Shurnomoyi* (1) is in one respect perhaps stronger than the present one (for the signature against each sum as it was advanced was strong evidence to show that the signature was given to witness that particular advance) as also that the dividing line may be in many cases a narrow one, but in a matter of this kind which seems, to put the matter most adversely to the plaintiff, at least open to doubt, I think we ought to follow the general principles of the decision in *Brojender Coomar* v. *Bromomoye Chowdhrani* (2), upon which learned counsel for the appellant relies, and I agree in holding that the entry relied on does not, under the circumstances of this case, amount to an acknowledgment which requires an anna stamp.

J. C. *Appeal allowed.*

Attorneys for the appellant: *Morgan & Co.*

(1) (1887) I. L. R. 15 Calc. 162. (2) (1878) I. L. R. 4 Calc. 885

APPEAL FROM ORIGINAL CIVIL.

Before Sir Lawrence H. Jenkins, K.C.I.E., Chief Justice, and Mr. Justice Woodroffe.

1912

Feb. 27.

RAMJI DAS

v.

JANKI DAS.*

Principal and Agent—Contract—Undisclosed Principal—Contract Act (IX of 1872), ss. 230 (2), 236.

To enable an agent to sue on a contract under section 230 (2) of the Contract Act, there must in fact have been a principal, though undisclosed, for whom he was acting in entering into the contract.

Where a person in entering into a contract purported to act as agent for an undisclosed principal, but in fact no such principal existed, and the person was in reality acting on his own account, he is debarred from suing on the contract by section 236 of the Contract Act.

APPEAL by the defendants, Ramji Das and others, from the judgment of Harington, J.

By a contract No. 3525, dated the 6th November 1907, the plaintiffs, Messrs. Janki Das & Co., sold to the defendants in their firm name of Messrs. Sarat Sookh Das Sarniram 100,000 gunny bags of a certain description at the rate of Rs. 30-4 per 100 bags free alongside export vessel in the port of Calcutta. Delivery was to be given and taken 20,000 bags monthly from December 1907 to April 1908. The contract was by bought and sold notes. The sold note was signed by the plaintiffs as brokers and purported to be addressed to principals. The December instalment was settled by a settlement contract No. 3601, dated the 16th December 1907. The bought note in

* Appeal from Original Civil, No. 58 of 1911.

this contract was signed by Messrs. Janki Das & Co., as brokers and was addressed to Messrs. Janki Das & Co., and the contract purported to be "in settlement of our contract No. 3525." The January instalment was similarly settled.

The defendants failed to take delivery of the February instalment.

On the 14th May 1908, Janki Das & Co. brought an action in the Small Cause Court claiming the sum of Rs. 58-10-3 as due to them under the settlement contracts, and the sum of Rs. 972-14-3 as damages arising on the defendants' failure to take delivery of the February instalment, amounting in the aggregate to Rs. 1,031-9. In their plaint, the plaintiffs alleged that they had sold the goods to the defendants and the suit was framed as an action by vendors against purchasers.

On the 27th July 1909, the suit was transferred to the High Court, at the instance of the defendants.

The suit came on for hearing before Harington J., and on the 29th June 1911, his Lordship passed a decree in the plaintiffs' favour observing:—

"This is an action brought by sellers against buyers for damages for breach of a contract for the sale of heavy C bags. Under the contract deliveries were to be made by the plaintiffs to the buyers at the rate of 20,000 bags a month from December 1907 to April 1908. The December instalment was not taken, but the loss due on it was settled under a settlement contract between the plaintiffs and the defendants and the money due to the plaintiffs was paid. A similar course was taken with regard to the January instalment, and the present action is brought with reference to February instalment. The issues raised are (i) did the defendants enter into the contract stated in the plaint, (ii) did the plaintiffs contract as agents for an undisclosed principal, or were the plaintiffs the real principals, and (iii) were the plaintiffs ready and willing to deliver the goods under the contract. With regard to the first issue the contract has been produced and proved and the witnesses called for the defendants do not deny it. The first issue therefore is decided in favour of the plaintiffs. With regard to the second issue it is argued that the plaintiffs,

1912

RAMJI DAS v. JANKI DAS.

while purporting to contract as agents for the defendants were really principals in the transaction, and the case *of Sewdutt Roy Maskara* v. *Nahapiet* (1) is relied upon as an authority for the proposition that under those circumstances the plaintiffs are debarred from recovering. Now that was a case in which the defendant had employed the plaintiffs as agents on his behalf, and in that case when acting for the defendant who was a buyer, it was the duty of the agents to get the goods at the lowest price they could for the buyer who had employed them, and under those circumstances it was held that they could not be principal sellers in the transaction because then the interest which they had in getting the best price as sellers of their own goods conflicted with the duty which they owed to their employer as buyer in getting the goods at the lowest price obtainable. That case went on the well recognised principle that the agent must not act as a principal so as to have an interest conflicting with the duty which he owed to his employer. But those principles do not apply to the facts of the present case, because there is no evidence that in this case the defendants employed the plaintiffs as their agents, or that they looked to the plaintiffs to obtain for them the goods at the lowest price at which the goods of the character were to be obtained. Two witnesses were called for the defendants : one of them states that he does not remember anything about the contract, and all, the other witness says, is he remembers the contract but does not remember whether a delivery order was tendered in respect of the goods which ought to have been taken under the contract at the end of February. The plaintiffs content themselves with merely proving the contract. There is no evidence therefore on the record as to the circumstances under which the contract was made, and no evidence which would justify a finding that the plaintiffs were employed by the defendants in a manner which placed them in a fiduciary relationship with regard to the defendants, as they would have been, had they been employed as agents for the purpose of getting the goods at the lowest price. Then if the relationship of principal and agent did not exist between the parties, section 236 of the Contract Act is no bar to the plaintiffs' claim, and the law as laid down in the case relied upon by the defendants has no application in the present action. It then becomes a case in which a broker purports to contract for an undisclosed principal, and under section 230 he is entitled to enforce that contract and to have the contract enforced against him. There is evidence that in this case there was a person behind the plaintiffs who they said was in fact a principal, whose name they did not disclose. But in my view whether there was a real principal behind or not does not affect the case, because the relationship of principal and agent did not exist between the plaintiffs and

(1) (1907) I. L. R. 34 Calc. 628.

the defendants. That being so, the rights of the defendants are not affected whether the person who is said to be an undisclosed principal was really a principal or not. The result is that the case made by the defence has not been established, because the defendants have not shown that the plaintiffs acted as agents for the defendants, and on that basis of facts the whole of that defence rested. With regard to the last issue there is evidence that the delivery order was tendered for the goods in question, and the defendants go no further towards contradicting that evidence than to produce a witness who says that he does not remember anything about it. The result is that there must be judgment for the plaintiffs for the amount claimed with costs on scale No. 2."

From this judgment the defendants appealed.

Mr. Knight (*Mr. Sircar* with him), for the appellants. The facts of this case come clearly within the purview of section 236 of the Contract Act and no action can lie. Messrs. Janki Das & Co., while purporting to enter into the contract in the character of agents, were in reality acting as principals and are barred from suing by section 236. Harington J. refused to apply his own decision in *Sewdutt Roy Maskara* v. *Nahapiet* (1), where he held that the principle underlying section 236 was the avoidance of conflict between duty and interest. It is submitted that case was rightly decided, but the true principle is that under the circumstances there was no contract at all. Section 230 (*2*) has no application to the facts of this case. It contemplates the case of an agent, who is the agent of one contracting party, and not, as here, of both. Moreover, section 230 assumes the actual existence of an unknown principal, and it is submitted that the existence of Kubiram, as a principal, has not been established.

Mr. Pugh (*Mr. A. N. Chaudhuri* with him), for the respondents, submitted that the case fell within section 230 (*2*) of the Contract Act, and conceded that

(1) (1907) I. L. R. 34 Calc. 628.

1912

RAMJI DAS v. JANKI DAS.

it turned on whether or not there was in fact an undisclosed principal.

[*Mr. Pugh* then dealt with the facts and evidence.]

Mr. Knight was not called upon to reply.

JENKINS C.J. This appeal arises out of a suit brought on a contract No. 3525 of the 6th of November 1907 for the sale by the defendants of a lac of gunny-bags of the sort described in the sold-note. The terms of the contract are set out in the sold-note, and it there appears, among other things, that the price was Rs. 30-4 per 100 bags free alongside, and that delivery of the goods was to be given and taken 20,000 monthly, from December 1907 to April 1908. That contract is signed by the plaintiffs as brokers; it purports to be addressed to the principals. The instalments of December and January were settled, and no question arises regarding them, except as to brokerage, as to which nothing has been said before us. The February instalment was not delivered; and according to the plaint, damage to the extent of Rs. 972-14-3 was thereby sustained by the plaintiffs and became due to them. The total sum claimed in this suit is thus Rs. 1,031-9. The case was instituted in the Presidency Small Cause Court, but was transferred to the High Court, and came on for hearing before Mr. Justice Harington, who has passed a decree in the plaintiffs' favour. From his judgment the present appeal is preferred.

It is not denied that the defendants entered into a contract in the terms of the sold-note; but it has throughout been denied that the defendants entered into such a contract *as is alleged*, that is to say, a contract as is set forth in the plaint, which represents the plaintiffs as *vendors* to the purchasers. When the case came before Mr. Justice Harington, the following

issues were raised: (i) Did the defendants enter into the contract stated in the plaint? (ii) Did the plaintiffs contract for an undisclosed principal or for themselves? (iii) Were the plaintiffs ready and willing to deliver?

Objection was taken to the third issue, but not to either of the other two—no objection could be taken to either of them, because they embodied and amplified that which was set forth in the written statement from the very commencement.

The plaintiffs respondents, have been represented before us by Mr. Pugh, who very properly accepted the position that this case must turn upon whether or not the plaintiffs are able to establish that they had an undisclosed principal behind them. The plaintiffs, as I have already said, purported to sign as brokers. If the contract was with the plaintiffs, it was entered into with them in their character of agents; and as no principal was disclosed then the position must be that there was an undisclosed principal or that there was no principal at all. The plaintiffs' contention is that there was an undisclosed principal, one Bhai Kubiram, and that the existence of this undisclosed principal entitles them to sue, under the provisions of clause 2 of section 230 of the Contract Act. So that what we have now to see is whether in truth Kubiram was the undisclosed principal or whether he is an afterthought. The plaint as drawn is opposed wholly to the idea that there was an undisclosed principal. It treats the plaintiffs as themselves the vendors. In the same way the settlements of December and January appear to me to point, if anything, not to Kubiram being the undisclosed principal, but to the plaintiffs themselves claiming to be the principals. There is no brokerage charged to Kubiram; as far as I can see there is no contract with Kubiram, and for some

1912

RAMJI DAS v. JANKI DAS.

JENKINS C.J.

reason, which I am wholly unable to understand if the case is a true one, Kubiram was not put into the box: no book of his was produced, and we are told, and the statement has not been contradicted before us, Kubiram's name never came to light until the opening of the plaintiffs' case. I am not satisfied that Kubiram was an undisclosed principal of the plaintiffs. If Mr. Justice Harington had held otherwise, I should have hesitated to differ from him on a question of fact like that, but as I read the judgment of the learned Judge, he is careful to avoid that conclusion. All he says is that "there is evidence that in this case there was a person behind the plaintiffs who they said was in fact a principal whose name they did not disclose." The learned Judge does not say that he believed that evidence. He does not discuss the various elements in the case which tell against the view that Kubiram was really and truly the undisclosed principal, but he goes on to say that in his view it is immaterial whether there was the relationship of principal and agent between Kubiram and the plaintiffs. But if Kubiram was not the undisclosed principal then section 236 of the Contract Act applies. In order to appreciate the true scope of that section one must bear in mind the general scheme of Chapter X of the Contract Act which deals with the subject of agency. The sections of that Chapter are divided into a series of groups, and of those I only need refer to two:—There is the group comprising sections 211 to 221, which deal with the agent's duty to the principal. Then there is the group which includes sections 226 to 238, which deal with the effect of agency on contracts with third persons. Mr. Justice Harington, in accepting the view that it was immaterial whether there was an undisclosed

principal or not, was influenced by the consideration that the relationship of principal and agent did not exist between the plaintiffs and the defendants. At the outset it is difficult to see how it could be said that there was not that relationship, and defendants certainly did not accept that view. But it is unnecessary to discuss the case from that point of view. Section 236 is clear and distinct. It provides that "a person with whom a contract has been entered into in the character of agent is not entitled to require the performance of it, if he was in reality acting not as agent, but on his own account." Having negatived the theory of Bhai Kubiram being an undisclosed principal, we have a position to which section 236 of the Contract Act applies with precision. It is to no purpose to consider what the line of cases is which that section seeks to embody, or whether it is in accord with the English rule of law. Enough to say that the section as it stands is the final exposition of law in India and, in my opinion, Kubiram disappearing, section 236 governs the case. The plaintiffs, therefore, are the persons with whom a contract has been entered into in the character of agents, and so they are not entitled to require the performance of it, inasmuch as in reality they were acting not as agents, but on their own account.

For these reasons, I think the judgment of Mr. Justice Harington cannot be upheld, and we must reverse his decree and dismiss the suit with costs throughout to be paid by the plaintiffs.

WOODROFFE J. I agree.

Appeal allowed.

Attorneys for the appellants: *S. D. Dutt & Ghose.*

Attorneys for the respondents: *Dey & Kshatriya.*

J. C.

ORIGINAL CIVIL.

Before Mr. Justice Fletcher.

1912

Feb. 29.

CHARNOCK COLLIERIES Co., LD.

v.

BHOLANATH DHAR.*

Mortgage—Company—Managing Agents—Articles of association, breach of, by Managing Agents—Acts requiring approval of directors—Presumption regarding internal management—Validity of deed irregularly executed—Equitable security—Winding-up—Lease—Liquidators in possession—Acquiescence of landlord—Arrears of rents and royalties, whether secured debts.

The company's articles of association empowered the managing agents, with the approval of the directors, to borrow or raise sums of money for the purposes of the Company, and to secure repayment of such sums by mortgage or charge of the property of the company, and to draw all such instruments as should be necessary for the carrying on of the business of the company, and directed that every instrument to which the seal of the company was affixed should be signed by at least one director, and countersigned by the managing agents. B. D., a stranger, advanced money to the company, which was credited in the company's books under loan account, and was given an instrument by way of hypothecation or security, to which was affixed the seal of the company and which was signed by the managing agents, but it did not sufficiently appear that the money had been borrowed with the approval of the directors, and the instrument was not signed by any of the directors as required by the articles :

Held, that it was not necessary to show the approval of the directors, inasmuch as this was a matter of internal management, regarding which the lender was, if he knew nothing to the contrary, entitled to assume as against the company that the managing agents had the authority or approval of the directors.

The Royal British Bank v. *Turquand* (1), *In re County Life Assurance Co.* (2), *County of Gloucester Bank* v. *Rudry Merthyr Colliery Co.* (3), and *In re Bank of Syria* (4) followed.

* Original Civil Suit No. 66 of 1912.

(1) (1856) 6 El. & Bl. 327.
(2) (1870) L. R. 5 Ch. App. 288.
(3) [1895] 1 Ch. 629.
(4) [1901] 1 Ch. 115.

1912

CHARNOCK COLLIERIES CO., LD. v. BHOLANATH DHAR.

With regard to the signature of a director, even if the security be not complete, the lender who had advanced money to the company upon the terms that security should be given him, is entitled under the rules of equity to have a charge upon the property of the company.

In re Queensland Land and Coal Co. (1), and *Pegge* v. *Neath Tramways Co., Ld.* (2), followed.

Where a landlord, to whom rents and royalties are payable by a company which goes into liquidation, acquiesces in the liquidators remaining in possession of the property leased, he cannot claim to be a secured creditor in respect of arrears of such rents and royalties.

THIS was a special case stated for the opinion of the Court under Order XXXVI of the Code of Civil Procedure, by agreement between the Charnock Collieries, Ld., in liquidation, and the liquidators of the one part, and Bholanath Dhar of the other part.

The points on which the opinion of the Court was sought were (i) whether a certain instrument of hypothecation dated the 3rd January 1910 was valid and created a charge on the assets of the company in favour of Bholanath Dhar, and (ii) whether the said Bholanath Dhar was a secured creditor in respect of certain rents and royalties due by the company to him by virtue of a kabuliat under which the company held the colliery.

With regard to the first point the facts were as follows :—On the 3rd January 1910 there was due from the company to Bholanath Dhar the sum of Rs. 2,004-8 on a promissory note for money advanced by the said Bholanath Dhar to the company. On that date Bholanath Dhar advanced a further sum of Rs. 3,995-8 to the company, making a total of Rs. 6,000. The articles of association of the company authorised the managing agents, with the approval of the directors, to borrow or raise any sum or sums of money for the purposes of the company in such manner and upon such terms and

(1) [1894] 3 Ch. 181. (2) [1898] 1 Ch. 183.

1912

CHARNOCK COLLIERIES CO., LD. v. BHOLANATH DHAR.

conditions as they thought fit, but it did not clearly appear that the said sums had been borrowed with the approval of the directors. The two sums were however borrowed by the managing agents on behalf of the company, and the total of Rs. 6,000 was credited in the books of the company under the heading of loan account. On the said 3rd January 1910 an Indenture was made between the company and Bholanath Dhar stating that the company thereby deposited with Bholanath Dhar the title deeds of the said colliery and assigned all the plant, machinery, etc., in or about the said colliery, by way of hypothecation or security, for the repayment of the said sum of Rs. 6,000 with interest thereon at 12 per cent. per annum, and stating that the company thereby put the said Bholanath Dhar in possession of the colliery. The articles of association authorised the managing agents, with the approval of the directors, to secure repayment of any sum or sums of money borrowed or raised by the managing agents for the purpose of the company by mortgage or charge of all or any part of the property of the company, and to draw on behalf of the company all such instruments as should be necessary for the carrying on of the business of the company, and directed that every instrument to which the seal of the company was affixed should be signed at least by one director, and countersigned by the managing agents. The said Indenture of the 3rd January 1910 bore the seal of the company, and was signed by the managing agents, but was not signed by any of the directors. The title deeds of the said colliery were, however, deposited with the said Bholanath Dhar. The company subsequently went into liquidation and the colliery was, by agreement between the parties, sold, and the proceeds of the sale were in the hands of the attorney to the liquidators. Bholanath Dhar claimed

to be a secured creditor of the company by virtue of the said Indenture of the 3rd January 1910, for the sum of Rs. 7,417-8 being the amount of principal and interest due under the said Indenture, and his claim was resisted on the ground that the said Indenture was invalid and of no effect in creating a security, inasmuch as it did not appear that the monies had been borrowed with the approval of the directors, and the said Indenture was not signed by any of the directors of the company as was required by the articles of association in the case of instruments to which the seal of the company was affixed.

The material articles of association are set forth in the judgment of Fletcher J.

With regard to the second point the facts were as follows:—On the 28th May 1906 Bholanath Dhar granted a kabuliat or lease of the said colliery to Nobo Gopal Bose and Tincoury Bose, under the terms of which certain rents and royalties were made payable to the said Bholanath Dhar. On the 31st August 1907 the said lease was assigned to the Charnock Collieries, Ld., who held the colliery under the assignment. When the company went into liquidation Bholanath Dhar was in possession, and possession was made over to the liquidators by Bholanath Dhar, who now claimed to be a secured creditor, by virtue of the said kabuliat, for arrears of rent and royalty both prior to and subsequent to the date of the liquidation.

Mr. P. L. Buckland, for the company. The Indenture of the 3rd January 1910 is inoperative. By article 112 every instrument to which the seal of the company is affixed must be signed at least by one director. This requirement has not been complied with. The indenture has therefore no legal operation as a charge, and Bholanath Dhar is merely a simple creditor.

1912

CHARNOCK COLLIERIES CO., LD. v. BHOLANATH DHAR.

Mr. L. P. E. Pugh, for Bholanath Dhar. It may be that the requirements of article 112 were not complied with. That is quite immaterial. It was not necessary to have affixed the seal of the company to the Instrument at all, because under article 50 the managing agents are given power to borrow or raise money for the purposes of the company by mortgage with the approval of the directors, and under article 84 they are given power to draw on behalf of the company all such instruments as shall be necessary for the carrying on of the business of the company. The affixing of the seal was therefore a superfluity. The Indenture of the 3rd January 1910 is signed by the managing agents and is a valid charge by them and binds the company. There is no doubt that the money was borrowed for the purposes of the company, and so far as the approval of the directors is concerned, we allege approval by them in fact, but if the proof of this is insufficient, it does not affect the question, because this is a mere matter of internal routine, and the mortgagee is entitled to assume that such matters have been duly complied with: *In re County Life Assurance Co.* (1), *The Royal British Bank* v. *Turquand* (2) which was followed in *County of Gloucester Bank* v. *Rudry Merthyr Colliery Co.* (3); and *In re Bank of Syria* (4).

But even assuming that the requirements of the articles have not been complied with, the mortgage is good upon another ground, that where the company has had the money and no other claims are in competition with the lender's security, and the lender has advanced his money on the footing that he is to have a valid mortgage or debenture, the lender has a valid equitable charge, and the company is bound in equity

(1) (1870) L. R. 5 Ch. App. 288, 293.
(2) (1856) 6 El. & Bl. 327.
(3) [1895] 1 Ch. 629.
(4) [1901] 1 Ch. 115.

even if the instrument is invalidly executed, and cannot raise the objection: *In re Queensland Land and Coal Co.* (1) which was followed in *Pegge* v. *Neath and District Tramways Co., Ld.* (2); and the charge will even extend to things intended to be included but not expressly mentioned in the Instrument: *County of Gloucester Bank* v. *Rudry Merthyr Colliery Co.* (3).

As regards the rents and royalties, although there is nothing in the lease making these a charge upon the property, the liquidators have been in possession and have had the benefit of the lease and sold the machinery upon the property, and the rents and royalties should therefore be paid by them to Bholanath Dhar as a secured creditor: *In re Oak Pits Colliery Co.* (4).

Mr. P. L. Buckland, in reply. The matter is not one of mere internal management. It is one of the essential conditions necessary to give the managing agents power. The lender must show that the approval of the directors had been given.

As regards the rents and royalties, the liquidators remained in possession with the acquiescence of Bholanath Dhar, and he cannot therefore claim as a secured creditor in respect of any portion of the rents and royalties.

FLETCHER J. This is a special case for the opinion of the Court under Order XXXVI of Schedule I of the Civil Procedure Code. The plaintiffs are the Charnock Collieries Co., Ld., in liquidation and Edward William Viney and John Woodhouse Thurston, the liquidators of the company; the defendant is Bholanath Dhar.

The matters in which the opinion of the Court is sought are under two headings. First, the defendant

(1) [1894] 3 Ch. 181.
(2) [1898] 1 Ch. 183.
(3) [1895] 1 Ch. 629.
(4) (1882) 21 Ch. D 322; 51 L. J. Ch. 768.

1912

CHARNOCK COLLIERIES CO., LD. v. BHOLANATH DHAR.

FLETCHER J.

claims as a secured creditor in respect of a sum of Rs. 7,417-8 which is said to be due to him under a certain instrument of hypothecation dated the 3rd January 1910 expressed to have been made between the company of the one part and the defendant of the other part.

The second part of the claim is with reference to the right of the defendant to be a secured creditor in respect of certain royalties and rents due by the plaintiff company to the defendant under the authority of a kabuliat under which the plaintiff held the colliery.

This colliery was, by an agreement made between the company, the defendant, and the liquidators, sold, and the proceeds of the sale are now in the hands of the attorney to the liquidators.

The first point is a short one. It appears that Bholanath Dhar on the 3rd January 1910 lent to the plaintiff company the sum of Rs. 3,995-8. On that date there was also due to that gentleman on a promissory note executed by the company Rs. 2,004-8. Therefore the amount taken to be lent on the 3rd January 1910 was Rs. 6,000. That amount, it is not denied by the liquidators, went into the coffers of the company and was credited by the company or its managing agents in the loan account.

The liquidators do not dispute the right of the defendant to prove as an unsecured creditor, but they say that the terms of the articles of the company were not complied with and that therefore the mortgage did not create a charge on the properties of the company.

The only articles which are material to this matter are Nos. 49, 50, 84 and 112.

Article 49 authorises the managing agents with the approval of the directors to borrow from the members or other persons, and may themselves lend any sum

or sums of money for the purposes of the company. Then follows a proviso which is not material to this case.

Article 50 says—"The managing agent may with such approval as aforesaid raise or secure repayment of such money in such manner and upon such terms and conditions in all respects as they think fit, and in particular by the issue of debentures or bonds of the company or by the creation of debenture stock, or by making, drawing, accepting or endorsing on behalf of the company any promissory notes or bills of exchange, or giving or issuing any other security of the company, or by mortgage or charge of all or any part of the property of the company including its uncalled capital."

Article 84 is material because by it a power which in England is confined to the board of directors is conferred on the managing agents. "Subject to the control and supervision of the directors the managing agents are by this article authorised to sign all such contracts, and to draw, accept, endorse and negotiate on behalf of the company all such bills of exchange, promissory notes, hundies, cheques, drafts and other instruments as shall be necessary for the carrying on of the business of the company, and to exercise all the powers, authorities and discretions of the company except only such of them as by the Company's Acts or these presents are expressly directed to be exercised by the board of directors or by the shareholders in general meeting. All monies belonging to the company shall be paid to such bankers as the managing agents, subject to the approval of the directors, shall deem expedient, and all receipts for monies paid to the company shall be signed by the managing agents whose receipts shall be an effectual discharge for the monies therein stated to have been received."

1912

CHARNOCK COLLIERIES CO., LD. v. BHOLANATH DHAR.

FLETCHER J.

Article 112 relates to the custody of the seal. It says—"The managing agent shall provide for the safe custody of the seal. Every instrument to which the seal is affixed shall be signed at least by one director and countersigned by the managing agents, provided that the signature of a director shall not be required to documents to which the seal is affixed and which are required for use only in connection with any civil and criminal proceedings in which the company is concerned or to documents which the managing agents are hereby expressly authorised to sign, but it shall be sufficient if such documents are signed by the managing agents only."

Now, the facts in this case are that the document given to the defendants on the 3rd January 1910 was sealed by the company. The seal of the company was affixed, but it was only attested by the signature of the managing agents.

The point really is whether, this document not having complied with the terms of the articles of association of the company, has the defendant a valid charge on the property of the company? In my opinion he has. This case is covered by authority starting, I think, with the case of *The Royal British Bank* v. *Turquand* (1). That has been followed by a long string of cases going down to the cases cited by Mr. Pugh: *County of Gloucester Bank* v. *Rudry Merthyr Colliery Co.* (2) and *In re Bank of Syria* (3). The point is this, whether a person dealing with the company is bound to look into what Lord Halsbury calls the "indoor management" of the company, that is whether a person dealing with the company is bound to see whether the act of the company is not *ultra vires*, or whether he may assume that all the acts done

(1) (1856) 6 El. & Bl. 327. (2) [1895] 1 Ch. 629.
(3) [1901] 1 Ch. 115.

1912

CHARNOCK COLLIERIES CO., LD. v. BHOLANATH DHAR.

FLETCHER J.

by the company or on its behalf are regular and proper. In my opinion in this case the lender was entitled to assume that the managing agent had the authority or approval of the board of directors. It seems to me that the observation of Sir G. M. Giffard in *In re County Life Assurance Co.* (1) exactly fits this case. He says, "in the first place a stranger must be taken to have read the General Act under which the company is incorporated and also to have read the articles of association; but he is not to be taken to have read anything more, and if he knows nothing to the contrary he has a right to assume as against the company that all matters of internal management have been duly complied with." That seems exactly to fit the case. The lender when he advanced money to the company was entitled to assume that the managing agent had obtained the approval of the board of directors to the borrowing of those sums. Then it is said that cannot be so in this case because on the document of hypothecation which was given to the defendant the seal of the company was only attested by the signature of the managing agents. With that argument I do not agree. Under article 50 managing agents are authorised to secure money advanced to the company by giving or issuing any security or by a mortgage or charge on all or any part of the company including its uncalled capital. It may be that the security is not complete, but the managing agents obviously have the power under article 50 to give a security on behalf of the company, and that security can be either by way of mortgage or a charge on any part of the property of the company.

It seems to me that under article 50 the managing agents have ample power to give a security. That being so, the affixing of the seal on the document

(1) (1870) L. R. 5 Ch. App. 288, 293.

1912

CHARNOCK COLLIERIES CO., LD. v. BHOLANATH DHAR.

FLETCHER J.

was not necessary. The signature of the managing agent in my opinion was ample. If that was not so, I should have decided upon the well-known class of cases where a person who advanced money to a company upon the terms that security should be given to him, even if the security be not complete, he is nevertheless entitled under the rules of equity to have a charge on the property of the company. That class of case rests on the elementary maxim of equity, that equity looks upon that as done which is agreed to be done. If the money were borrowed on account of the company it is not open to the company to say that the person who lent the money is not entitled to a charge. It is only necessary to refer to the case of *In re Queensland Land and Coal Co.* (1) in which North J. held that a person is entitled to a charge on the property of the company where the debenture was void. Mr. Pugh also cited *Pegge v. Neath Tramways Co., Ld.* (2), which decided where a person who never had a debenture was entitled to call for the security because he lent money on the footing that he was to get the security.

It seems to me on all these grounds that the defendant is entitled to a charge upon the monies in the hands of the attorney of the liquidators for the sum of Rs. 7,417-8.

The other portion of the claim set up by the defendant is, I think, not well founded. That relates to certain monies that became due to the defendant in respect of rents and royalties under the lease under which the plaintiff company held the collieries.

The general rule is that the defendant would be entitled only to prove for the rent that became due prior to the liquidation and to claim to have the full rent paid subsequent to the liquidation if the liquidators

(1) [1894] 3 Ch. 181. (2) [1898] 1 Ch. 183.

remain in possession for the benefit of the company; but if the liquidators remain in possession after the liquidation with the acquiescence of the landlord then that right of the landholder to have the rent accruing due after the liquidation paid to him as a secured creditor would not stand, and he would be relegated to the position of having a right of proof as an unsecured creditor. In this case no difficulty arises because after the liquidation the defendant was in possession and it appears quite clear from a letter set out in exhibit E to the special case that possession was made over by the defendant to the liquidators subsequent to the liquidation.

The rule therefore that the landlord is entitled to be paid in full for rent accruing due subsequent to the liquidation should the liquidators remain in possession cannot be applied to this case, as the landlord acquiesced in the liquidator's possession; and therefore in so far as the special case asks for the opinion of the Court as to whether the defendant is entitled to claim as a secured creditor in respect of the rents which are due under the terms of the kabuliat either before or after the liquidation, I answer by saying he is a secured creditor in respect of no portion of that rent. Mr. Buckland has asked me not to say anything as to what the actual position of the defendant is, and I shall refrain from doing so.

The liquidators will pay the defendant's costs and retain their own costs. The liquidators' costs will be as between attorney and client.

C. B.

APPEAL FROM ORIGINAL CIVIL.

Before Sir Lawrence H. Jenkins, K.C.I.E., Chief Justice, and Mr. Justice Woodroffe.

1912

Feb. 29.

SHIB KRISTO DAW & CO.

v.

SATISH CHANDRA DUTT.*

Arbitration—Award—Decree following award—Appeal, right of—Civil Procedure Code (Act V of 1908) Second Schedule, rules 15 & 16—Letters Patent of 1865, clause 15.

Where an application to set aside an award on the ground that it was made after the expiration of the period allowed by the Court has been refused, and subsequently judgment has been given according to the award, no appeal lies from such judgment on the same ground whether under the Letters Patent or under the Code of Civil Procedure.

APPEAL by the plaintiffs from the order of Harington J.

On the 10th July 1909 the plaintiffs instituted this action against the defendants for the recovery of the sum of Rs. 15,982-14-9 which they claimed as due to them under an award in certain arbitration proceedings and in the alternative for an account of the dealings and transactions which had taken place under an agreement of the 31st March 1905.

By an order of Court made on the 21st February 1910, with the consent of both parties all matters in dispute in the suit were referred to the arbitration of Mr. Saroda Charan Mitter who was directed to make his award in writing and to submit the same to the Court together with all proceedings, depositions and exhibits within two months from the date on which an office copy of the order should be delivered to him, with liberty to him to extend such time for a

* Appeal from Original Civil, No. 33 of 1911, in Suit No. 704 of 1909.

further period of two months. By an order of the 8th August 1910, the returnable date was further extended till the 6th October 1910, with the result that the time expired during the long vacation of the High Court. The arbitration was completed by the 2nd September 1910, but the award was not signed till the 21st November 1910, the date of the reopening of the High Court, after the vacation; on which date also the award was submitted by the arbitrator to the Registrar of the High Court.

In his award, the arbitrator disallowed the plaintiffs' claim, allowed the defendants the sum of Rs. 5,272-4-9, and directed each party to pay their own costs.

On the 8th February 1911, at the request of the Registrar, the arbitrator submitted the proceedings of the arbitration to the Registrar and on the same date the Registrar issued the following notice to the parties: "Take notice that the award of the arbitrator appointed in this suit under an order of Court, dated the 21st February 1910, has this day been submitted to my office, and that the same will be filed on either party providing the requisite stamps and that the Court will proceed to pass judgment on such award on the 20th February 1911."

On the 27th February 1911 the plaintiffs applied for an order that the arbitration may be superseded and that the suit may proceed on the ground that inasmuch as the arbitrator had failed to submit his award within time, the award was void and of no effect. This application was refused.

On the 13th March 1911, on the application of the defendants, Harington J. gave judgment on the award, observing :—

"This is an application for judgment on an award and it is objected to on the ground that the award was made out of time. There are no merits

1912

SHIB KRISTO DAW & CO. v. SATISH CHANDRA DUTT.

at all in the objection, and I have to consider whether the award should be given effect to. It appears that an order was made under which the arbitrator was allowed two months' time from the 6th August to file his award in this suit. That time would expire when the Courts were closed in the vacation, so when the two months expired it was impossible to comply with the order to file the award within the specified time. What the arbitrator did was to file it as soon as the Court reopened, and it is contended by Mr. Sircar who applies for judgment in terms of the award that by virtue of section 10 of the General Clauses Act of 1907 inasmuch as the act directed by the order was an act to be done in Court and the Court was closed the act was properly done on the day the Court reopened. On the other side it is contended that the aribtrator was bound to have signed his award within the two months and that not having been done the award is bad. In my view that contention fails because the order extending the time having fixed a time which expired during the vacation and by virtue of clause 10 of the General Clauses Act the time was extended to the first day on which the Courts reopened. There is nothing stated in the order with regard to the signing or making of the award. In my view, therefore, the effect of the order was to extend the time for the making of the award up to the day the Courts reopened because it was an order to do an act to which section 10 of the General Clauses Act applies. I therefore hold that the award is a valid one and there must be judgment in terms thereof with costs."

From this judgment and order the plaintiffs appealed.

Mr. B. Chakravarti (*Mr. P. K. Sen* with him), for the appellants. The further time allowed for filing the award was two months from August 6th, 1910. The award cannot be said to have been filed till the 9th February 1911. In consequence, the alleged award was invalid, and a nullity. The application made by the plaintiffs on the 27th February 1911 was wrongly refused, in view of rule 15 of the Second Schedule to the Code of Civil Procedure. Rule 16 of the Schedule contemplates a valid award, and not one that is a nullity, to which it can have no application. The finality contemplated by rule 16 is finality in respect of matters of fact or matters of law. An award which

is *ab initio* illegal or invalid cannot be confirmed or made a decree of Court: *Raja Har Narain Singh* v. *Chaudhrain Bhagwant Kuar* (1), *Saturjit Pertap Bahadoor Sahi* v. *Dulhin Gulab Koer* (2), *Ramesh Chandra Dhar* v. *Karunamoyi Dutt* (3). In any event an appeal lies under clause 15 of the Letters *Patent*.

Mr. B. C. Mitter (*Mr. Sircar* with him), for the respondent. It is submitted that no appeal lies. Although there may have been some conflict between the decisions under the old Civil Procedure Code of 1882, rules 15 and 16 of Schedule II of the new Code of 1908 place the matter beyond doubt. The object under both codes was to secure the finality of an award. As indicated by Mukerjee J. in *Chintamoni Aditya* v. *Haladhar Maiti* (4), the decisions in *Kali Prosanno Ghose* v. *Rajani Kant Chatterjee* (5), and *Mahomed Wahiduddin* v. *Hakiman* (6) were in effect overruled by the Privy Council in *Ghulam Khan* v. *Muhammad Hassan* (7), where it was held that where an award has been made and the Court has refused to set it aside, the Court must pass a decree thereon, and from such decree no appeal lies. *See* also *Hansraj* v. *Sundar Lal* (8). *Raja Har Narain Singh* v. *Chaudhrain Bhagwant Kuar* (1) was a decision under the old Code of 1882.

In *Kanakku Nagalinga Naik* v. *Nagalinga Naik* (9) it was held that no appeal would lie under the old Code on the ground that the award was void *ab initio*. Reading rules 15 and 16 of Schedule II to the new Code together, it is clear that it was competent to the Court

(1) (1891) I. L. R. 13 All. 300.
(2) (1897) I. L. R. 24 Calc. 469.
(3) (1906) I. L. R. 33 Calc. 498.
(4) (1905) 2 C. L. J. 153, 158.
(5) (1897) I. L. R. 25 Calc. 141.
(6) (1898) I. L. R. 25 Calc. 757.
(7) (1901) I. L. R. 29 Calc. 167.
(8) (1908) I. L. R. 35 Calc. 648; L. R. 35 I. A. 88.
(9) (1909) I. L. R. 32 Mad. 510.

1912

SHIB KRISTO DAW & CO. v. SATISH CHANDRA DUTT.

of first instance to consider the question of the invalidity of the award on the ground of its having been made out of time, and on the Court of first instance refusing the application to set aside the award and giving judgment according to the award, no appeal can now lie under the Code on the ground that the award was void *ab initio*. Further no appeal lies under clause 15 of the Letters Patent : *Walii Mathuradas* v. *Ebji Umersey* (1). So far as the power of appeal under clause 15 of the Letters Patent is concerned, it does not matter whether the award is void *ab initio* or not.

Mr. Chakravarti, in reply.

JENKINS C. J. In my opinion, no appeal lies in this case. It has to be seen first what is that from which the present appeal is preferred. It is from the judgment pronounced and the decree made on the 13th day of March 1911. Now, what was the decree made on that day ? It is a decree whereby it was declared that the award therein mentioned ought to be carried into effect and the same was ordered and decreed accordingly. The judgment was the judgment on which that decree followed.

Then how did the judgment and decree come to be pronounced and passed ? It was in compliance with rule 16 of the Second Schedule to the Code of Civil Procedure. That rule provides that " (*1*) Where the Court sees no cause to remit the award or any of the matters referred to arbitration for reconsideration in manner aforesaid, and no application has been made to set aside the award, or the Court has refused such application, the Court shall, after the time for making such application has expired, proceed to pronounce judgment according to the award. (*2*) Upon the

(1) (1904) I. L. R. 29 Bom. 285.

judgment so pronounced a decree shall follow, and no appeal shall lie from such decree except in so far as the decree is in excess of, or not in accordance with, the award". There, therefore, is an explicit provision that from the decree there should be no appeal, and that provision is, to my mind, conclusive as to the power of appeal from the decree as such, notwithstanding the provisions in clause 15 of the Letters Patent of this Court. But it is sought to escape from the provisions of rule 16 by suggesting either that there was no award or that there was an application to set aside the award, and from the determination of that application, at any rate if it was adverse to the present appellants, an appeal would lie. I fail to see how it can be said, in view of the language used in rule 15 that there was no award, because that rule deals explicitly with the position of an award having been made after the expiration of the period allowed by the Court, and it does not, as the Code of 1882 did, provide that such an award shall not be valid, but that such an award must be set aside, so that it seems to me that it cannot be said that there was no award. The most that could be said is that this award was liable to be set aside.

But if it be said that there is a right of appeal from the order refusing to set aside the award, the answer is that this is not an appeal from such an order. The appeal is from the judgment and decree of the 13th of March 1911, that being the only judgment and decree with which the appellants profess to be dissatisfied. I am unable to find anything that justifies the view that the decree of the 13th of March was in any sense an order under rule 15. Had it been such an order, then we should have had to consider whether an appeal would lie under the Letters Patent. In the view I take no such question arises.

1912

SHIB KRISTO DAW & CO. v. SATISH CHANDRA DUTT.

The result is that this appeal must be dismissed with costs.

WOODROFFE J. I agree.

Appeal dismissed.

Attorney for the appellants: *Benode Behary Banerji.*
Attorneys for the respondents: *S. D. Dutt & Ghose.*

J. C.

APPELLATE CIVIL.

Before Justice Sir Richard Harington and Justice Sir Asutosh Mookerjee.

1912

March 5.

PURNA CHANDRA SARMA

v.

PEARY MOHAN PAL DAS.*

Mortgage—Right to foreclosure and Right to redeem, if co-extensive—Covenant to pay the mortgage money within a year, effect of.

Unless there is an agreement to the contrary, the right of foreclosure and the right of redemption must be deemed co-extensive. In each particular instance, therefore, it must be determined upon the terms of the contract between the parties whether there is any special provision in the contract which takes the case out of the general rule.

Where the covenant in the mortgage deed was that the mortgagor shall pay the amount of principal and interest within the term of one year:

Held, that this clause was inserted for the benefit of the mortgagor so that he may be at liberty to pay the principal with interest before the expiry of the year.

Rose Ammal v. *Rajarathnam Ammal* (1) relied on.

* Appeal from Appellate Decree, No. 69 of 1910, against the decree of Dandadhari Biswas, Subordinate Judge of Chittagong, dated Dec. 2, 1909, reversing the decree of Nisi Kant Guha, Munsif of Patiya, dated May 31, 1909.

(1) (1898) I. L. R. 23 Mad. 33.

1912

PURNA CHANDRA SARMA v. PEARY MOHAN PAL DAS.

Held, further, that such a case falls within the class of cases in which the mortgage is payable before a certain day and not within the class where a day is fixed for the re-payment of the debt.

Raghubar Dayal v. *Budhu Lal* (1) and *Brown* v. *Cole* (2) distinguished.

SECOND appeal by Purna Chandra Sarma, the mortgagor, defendant No. 1.

Defendant No. 1 executed a mortgage bond on the 3rd Sravan of 1269 M.E. in favour of the plaintiff Peary Mohan Pal to secure payment of Rs. 300 agreeing to pay interest at the rate of 40 *aris* of paddy per annum per hundred rupees or Rs. 100 as total price, to repay the whole within a year and to pay interest at the bond rate on the interest not paid within Pous of each year. There was no time fixed for repayment of the mortgage money in the deed as drawn up, but after the deed had been executed a clause was added to the effect that the money was to be paid, principal and interest, within one year.

The mortgage deed was executed on the 19th July 1907 (3rd Sravan 1269 M.E.). The deed was registered on the 20th July 1907. Just four days after, *i.e.*, on the 24th July 1907, the principal amount covered by the bond, plus Rs. 2 as interest, up to date, was tendered by the defendant No. 1 to the plaintiff in discharge of the mortgage debt, but as he refused to accept the same the amount was deposited in Court to the credit of the plaintiff. The plaintiff (mortgagee) brought a suit for recovery of mortgage dues by sale of the mortgaged land. The Munsif found that under the deed Rs. 2 only was due as interest on the principal on the date of the deposit and that the deposit was valid and sufficient. He therefore dismissed the suit.

On appeal, the Subordinate Judge held that under the deed the defendant was bound to pay at least one year's interest before the debt could be discharged,

(1) (1885) I. L. R. 8 All. 95. (2) (1845) 14 Sim. 427.

1912

PURNA CHANDRA SARMA v. PEARY MOHAN PAL DAS.

and if the defendant No. 1 deposited the principal with one year's interest within the year, his deposit could be taken as sufficient. There being no sufficient deposit the plaintiff's suit should have been decreed.

The defendant No. 1 thereupon preferred this second appeal to the High Court.

Babu Khitish Chandra Sen, for the appellant, submitted that upon the terms of the mortgage deed the defendant was entitled to deposit the mortgage debt within one year.

Babu Akhil Bandhu Guha, for the respondent. Upon a proper construction of the deed, the defendant was not entitled to deposit the money within a year and this being a case of mortgage the true test was whether the plaintiff was entitled to bring a suit for foreclosure within the year. The right of foreclosure and right of redemption were co-extensive and he referred to the following cases: *Vadju* v. *Vadiu* (1), *Raghubar Dayal* v. *Budhu Lall* (2), *Tirugnana Sambandha* v. *Nallatambi* (3), *Syad Abdul Hak* v. *Gul m Jilani* (4), *Husaini Khanam* v. *Husain Khan* (5), *Prannath Roy Chowdry* v. *Rookea Begum* (6), *Brown* v. *Cole* (7); and further submitted that these clauses were not to be interpreted in favour of the debtor as it was wont to be done, and referred to Ghose's Mortgage, p. 230 (3rd Edn.).

Babu Khitish Chandra Sen, in reply. The cases cited by the respondent are distinguishable. In all of them a particular date was fixed for payment.

HARINGTON AND MOOKERJEE JJ. This is an appeal on behalf of the first defendant in a suit to enforce a

(1) (1880) I. L. R. 5 Bom. 22.
(2) (1885) I. L. R. 8 All. 95.
(3) (1892) I. L. R. 16 Mad. 486.
(4) (1895) I. L. R., 20 Bom. 677.
(5) (1907) I. L. R. 29 All. 471.
(6) (1859) 7 Moo. I. A. 323.
(7) (1845) 14 Sim. 427.

mortgage security, executed by him on the 19th July 1907 for an advance of Rs. 300. It was agreed between the parties that interest would be paid at the rate of 40 *aris* of paddy on Rs. 100 annually; in other words, that 120 *aris* of paddy would be paid upon the principal amount each year. It was further provided that if interest was not paid in kind, as stipulated, the value of the paddy would be taken as Rs. 100. There was, however, no time fixed for repayment in the deed as drawn up; the position, thus, was that the mortgagee could enforce the security whenever he liked and the mortgagor could claim redemption whenever he pleased: *Fitzgerald* v. *Mellersh* (1), *Harding* v. *Tingey* (2). Consequently after the deed had been executed, a clause was added to the effect that "the money would be paid, principal and interest, within one year," and this was separately signed by the mortgagor. It is not disputed that on the 24th July 1907 the mortgagor tendered to the mortgagee the principal together with the interest which had accrued due up to that date. The mortgagee declined to accept the money, whereupon the sum was deposited in Court. On the 15th March 1909, the mortgagee commenced this action and claimed to recover the principal sum together with interest up to the date of suit and *pendente lite*.

The Court of first instance overruled this contention and held that the mortgage had been redeemed by the tender of the principal and interest on the 24th July 1907. Upon appeal, the Subordinate Judge has held that the tender was premature and that the plaintiff is entitled to enforce the security.

On behalf of the appellant, the mortgagor, it has been argued that upon a true construction of the last clause in the deed, it was open to the mortgagor to redeem the security on the 24th July 1907. On behalf

(1) [1892] 1 Ch. 385. (2) (1864) 34 L. J. Ch. 13.

1912

PURNA CHANDRA SARMA v. PEARY MOHAN PAL DAS.

of the respondent it has been contended, upon the authority of the cases of *Vadiu* v. *Vadiu* (1) and *Raghubar* v. *Budhu* (2), that the mortgagor was not entitled to redeem before the expiry of one year from the date of the mortgage. It has further been argued that the right of redemption and the right of foreclosure are co-extensive; and in support of this proposition, reliance has been placed upon the observation of Lord Kingsdown in the case of *Prannath Roy Chowdry* v. *Rookea Begum* (3) and upon the cases of *Tirugnana* v. *Nallatambi* (4), *Husaini Khanam* v. *Husain Khan* (5), *Sayad Abdul Hak Sardar* v. *Gulam Jilani* (6) and *Brown* v. *Cole* (7). In our opinion, the view taken by the Subordinate Judge is clearly erroneous and cannot be supported.

It need not be disputed that unless there is an agreement to the contrary, the right of foreclosure and the right of redemption must be deemed co-extensive In each particular instance, therefore, it must be determined upon the terms of the contract between the parties whether there is any special provision in the contract which takes the case out of the general rule. No doubt there are observations in the case of *Vadiu* v. *Vadju* (1) which may be taken to support the contention of the respondent. But the case of *Raghubar* v. *Budhu* (2) is clearly distinguishable. There, it is obvious from the judgment, a date had been specifically fixed for redemption and such date was binding equally upon the mortgagor and the mortgagee. The case of *Brown* v. *Cole* (7) also was obviously a case of this description. Now, in the case before us, the particular covenant upon which both the parties rely

(1) (1880) I. L. R. 5 Bom. 22.
(2) (1885) I. L. R. 8 All. 95.
(3) (1859) 7 Moo. I. A. 323, 355.
(4) (1892) I. L. R. 16 Mad. 486.
(5) (1907) I. L. R. 29 All. 471.
(6) (1895) I. L. R. 20 Bom. 677.
(7) (1845) 14 Sim. 427.

1912

PURNA CHANDRA SARMA v. PEARY MOHAN PAL DAS.

is to the effect that the mortgagor shall pay the amount of principal and interest within the term of one year. The mortgagee invites us to treat this covenant as if it provided that the mortgagor was not to pay the amount of principal and interest before the expiry of one year. It is in our opinion impossible to construe it in this way. It is fairly clear that this particular clause was inserted for the benefit of the mortgagor, so that he might be at liberty to pay the principal with interest before the expiry of one year: *Rose Ammal* v. *Rajarathnam* (1). In fact, the present case falls within the class of cases in which the mortgage is payable before a certain day, and not within the class where a day is fixed for the payment of the debt. In this view, it is clear that this appeal must be allowed, the decree of the Court below set aside and that of the Court of first instance restored with costs both here and in the Court of appeal below.

S. K. B. *Appeal allowed.*

(1) (1898) I. L. R. 23 Mad. 33.

CRIMINAL REVISION.

Before Mr. Justice Holmwood and Mr. Justice Sharfuddin.

1912

March 7.

SIVA SUNDARI CHOWDHRANI

v.

EMPEROR.*

Rioting—Test of liability of owner, or person having or claiming an interest in land, for the acts and omissions of an agent or manager—Appointment of atter by the mother, and not by the adopted son—Legality of the conviction of the son—Penal Code (Act XLV of 1860), s. 154.

The criminal liability of a person specified in s. 154 of the Penal Code for the acts or omissions of an agent or manager depends upon the question by whom the latter was appointed. Where, therefore, it was shown that three Hindu *pardanashin* ladies had the management of the estate and were responsible for the appointment of the naib who had fomented the riot, and that their adopted sons had nothing to do with such appointment, though they took some share in the active management of the estate :

Held, that the ladies were alone liable under s. 154.

It is impossible to punish in every case every person who has any interest in the land. The responsibility depends on the fact of the person who caused the riot being himself the person who has an interest in the land, or an agent or a manager of such person, and one of the facts to be proved is whose agent or manager the person fomenting the riot is.

THE petitioners 1 to 3 were *pardanashin* ladies living in a village in the interior of the district of Faridpore, and were the widows, respectively, of three brothers named Mohim Chandra, Rajendra Chandra and Debendra Chandra Roy Chowdhry, who had jointly owned extensive properties in several districts in East Bengal. They were appointed executrixes to the estates by their respective husbands, took out probate in due form, and were in possession and had the general

* Criminal Revision, No. 168 of 1912, against the order of A. J. Chotzner, Sessions Judge of Backergunge, dated Nov. 21, 1911.

management of the estates and made the appointments of the officers thereof. The petitioners 4 and 5, and another who was acquitted on appeal, were the adopted sons of the above. The Judge found that under the will of Mohim his widow held his estate for life, but that no such provision was made by the two other brothers, and that their adopted sons, who had attained majority, could have, but had not as a matter of fact, been put in possession of their shares, the management still continuing in the hands of the first three petitioners. There was some evidence that petitioners 4 and 5 actually performed the landlord's duties of settling the tenants' rents and deciding their disputes.

It appeared that, on the 20th May 1910, a riot was committed at Alipura, within the petitioners' zamindaries, at the instance of Shashi Chatterjee, a naib of the estate. Four persons were convicted and sentenced therefor, under ss. 147 and 324 of the Penal Code, to one and two months' rigorous imprisonment, respectively, by the Subdivisional Officer of Patuakhali. Their appeals were dismissed by the Sessions Judge of Backergunge on the 25th November 1910, and an application to the High Court in revision met with a similar result. On the 22nd March 1911, the Sub-Inspector of Galachipa made a report to the Subdivisional Officer of Patuakhali recommending proceedings against the present petitioners and the adopted son of the first petitioner, under ss. 154, 155 and 156 of the Penal Code, on account of the previous occurrence. They were put on their trial under ss. 154 and 155 of the Penal Code, and convicted and sentenced thereunder, by the Subdivisional Officer, each to a fine of Rs. 500 for each offence. On appeal, the Sessions Judge of Backergunge acquitted the adopted son of the first petitioner altogether, and set

1912

SIVA SUNDARI CHOWDHRANI v. EMPEROR.

aside the convictions and sentences of the others under s. 155 but maintained those under s. 154. The present petitioners thereupon moved the High Court and obtained the present Rule.

Babu Manmatha Nath Mukherjee, for the Crown. Section 154 is very wide, and imposes a liability on every one who has an interest in land. The naib who got up the riot received pay from the estate. Every one who controls or manages the estate is liable. The executrixes had the estate vested in them, and had the power of exercising control over the appointment and removal of the naib, and they are clearly within the section. Any one of the co-sharers would also be liable, even if he had no power of appointment and removal of the naib, provided he was, as in this case, in present possession and was managing the estate.

Mr. K. N. Chaudhuri (with him *Babu Gunada Charan Sen*), for the petitioners. It is not every one having an interest in land who falls within the purview of the section, but only such persons as have control over the management of the property: see *In the matter of Radha Nath Chowdhry* (1). The petitioners 4 and 5 had no such control.

HOLMWOOD AND SHARFUDDIN JJ. This was a Rule calling on the District Magistrate of Backergunge to show cause why the conviction and sentence passed on the petitioners should not be set aside, or such other order passed as to this Court may seem fit, on the ground that it is doubtful which of the petitioners, if any, is liable under section 154 of the Indian Penal Code.

Now, the facts are that a certain naib of the estate got up a riot in order to dispossess certain persons by force. Four rioters were convicted: one of them was

(1) (1880) 7 C. L. R. 289.

sentenced to one month and three others to two months' rigorous imprisonment. The first point, therefore, which we have to notice is that this riot appears not to have been in any sense a serious one. There is no doubt, under section 154 of the Indian Penal Code, that the owner or occupier of the land, or any person having or claiming an interest in such land, is punishable with fine not exceeding 1,000 rupees, if he or his agent or manager do not use all lawful means in their power to prevent it, and, in the event of its taking place, do not use all lawful means in their power to disperse or suppress the riot, and if they, knowing or having reason to believe that such an offence is being or has been committed, or is likely to be committed, do not give the earliest notice thereof in their power to the nearest police-station. In this case it is admitted that the ladies themselves did not do or omit to do any of the things which are set out under section 154. It was their agent or naib who got up the riot apparently to promote his own ends, and who did not take any steps to prevent it or give notice to the police-station. The ladies, therefore, in this case, or their adopted sons would be responsible for having appointed such an agent and for not having removed him.

The question, therefore, which arises in this case is as to who was responsible for the management of this estate, and for the appointment of the officers under the estate. It is clearly proved by the general manager, Mr. Savi, that the three ladies, Siva Sundari Chowdhurani and two others, were fully responsible for these appointments; and that, although their adopted sons took some share in the active management of the estate, they are in no way responsible for the appointment of this naib who created this riot. It seems to us impossible to punish in every case

1912

SIVA SUNDARI CHOWDHRANI v. EMPEROR.

every person who has any interest in the land. The responsibility must depend upon the fact of the person who caused the riot being himself the person who has an interest in the land, or an agent or manager of such person; and one of the facts to be proved was whose agent or manager the person who fomented the riot is. In this case we cannot trace the appointment of this naib to any one else but the three ladies, and the conviction and sentence, therefore, against the two adopted sons, Dhakhina Ranjan Roy Chowdhury and Ramesh Chandra Roy Chowdhury, must be set aside, and the fine, if paid, must be refunded.

Then, as regards the liability of the ladies, we think that in this case they must be considered to be jointly liable, although, the case being one under the Criminal law, separate sentences have to be passed against each of them; and we think that in all these cases what should be considered is the extent of the responsibility entailed upon the estate by the occurrence, for it would be manifestly inequitable that in a riot between two sets of zamindars, where there are hundred co-owners on one side and one only on the other, that the one man should be fined 100 rupees, and the hundred men should be fined 100 rupees each, which seems to be the principle upon which the present case has been decided. We consider that a fine of 300 rupees would amply meet the justice of this case.

We reduce the sentence on each of the ladies to a fine of 100 rupees each, and in default one month's simple imprisonment. The Rule is so far made absolute, and the balance of the fine, if paid, will be refunded.

E. H. M.

APPELLATE CIVIL.

Before Justice Sir Richard Harington and Justice Sir Asutosh Mookerjee.

NIM CHAND SAHA

v.

JOY CHANDRA NATH.*

1912

March 7.

Under-raiyat—Bengal Tenancy Act (VIII of 1885), s. 48—Holding of under-raiyat.

Section 48 of the Bengal Tenancy Act applies to cases in which the land held by the raiyat is co-extensive with the land held by the under-raiyat.

SECOND APPEAL by the plaintiff, Nim Chand Saha.

It arises out of a suit for rent of an under-raiyati holding.

The plaintiff is the occupancy raiyat of a holding containing 12 kanis and 13 gandas of land. The lands are classified in the lease creating the plaintiff's tenancy, and rent is assessed at rates varying from Re. 1 to Rs. 2-4 a kani, the aggregate rent being stated to be Rs. 21-14 a year. The defendants are under-raiyats under the plaintiff under a lease of one of these plots only, the rent whereof was assessed at Rs. 2-4 a kani in the plaintiff's lease.

On a previous occasion the plaintiff sued the defendant for ejectment, when the latter pleaded that he held the land at an annual rental of Rs. 10.

In the present suit the plaintiff claims rent at the rate of Rs. 14 a year. The defendants answer that under section 48 of the Bengal Tenancy Act the plaintiff is not entitled to claim rent at a rate higher than Rs. 3-5-7.

* Appeal from Appellate Decree, No. 168 of 1910, against the decree of G. N. Roy, District Judge of Tipperah, dated Oct. 11, 1909, modifying the decree of Amulya Gopal Roy, Munsif of Comillah, dated March 29, 1909.

1912

NIM CHAND SAHA v. JOY CHANDRA NATH.

The first Court gave a decree to the plaintiff at the rate of Rs. 10 a year. On appeal, the District Judge allowed the contention of the defendants. The plaintiff, thereupon, preferred this second appeal to the High Court.

Babu Tarakishore Chowdhuri (with him *Babu Gopal Chandra Das*), for the appellant, submitted that section 48 of the Bengal Tenancy Act did not apply to a case in which the raiyat let out to his under-tenant only a portion of his holding because a holding usually comprises different classes of land, one parcel may be the best of the holding while the rest may fetch only a nominal rent. There is no reason why the raiyat should not be allowed to realise for the best part of his land rent more than 50 per cent. in excess of what he himself pays to his superior landlord. Reliance was placed upon a decision of Geidt J. (second appeal No. 415 of 1903, decided 3rd June 1904).

Babu Birendra Chandra Dass, for the respondent. Section 48 of the Bengal Tenancy Act does not say that it is applicable only where the holdings of the under-tenant and that of his landlord are co-extensive, and not to a case where the under-raiyat holds only a parcel of the land held by his landlord. The test is if there are any data from which the rent payable by the landlord of the under-raiyat to his superior landlord for the parcel of land let out to the under-raiyat can be determined. If it cannot be, section 48 would apply. But if it can be ascertained, there is no reason why section 48 should not be applicable: see the decision of Geidt J. in S. A. No. 415 of 1903, decided 3rd June 1904 (unreported). If the section were to apply only where the holdings of the under-raiyat and that of his landlord are co-extensive and not where the under-raiyat holds a portion of the land held by his

landlord, the policy of Legislature would be defeated. In this way the landlord of the under-raiyat has only to split up his holdings into several plots and then sublet them, in order to evade the provisions of the section. The section is intended for the protection of the under-raiyat, and it must therefore be so construed as to satisfy and not to defeat this intention of the Legislature.

HARINGTON AND MOOKERJEE JJ. This is an appeal on behalf of the plaintiff in an action for rent. The sole point in controversy relates to the rate at which the plaintiff is entitled to realise rent in view of section 48 of the Bengal Tenancy Act. The plaintiff is an occupancy raiyat and the defendants are under-raiyats under him. The defendants were on a previous occasion sued in ejectment; they then pleaded that they held these lands on payment of rent at the rate of Rs. 10 a year. On the present occasion, the plaintiff claims at the rate of Rs. 14 a year. The defence is that under section 48 of the Bengal Tenancy Act he is not entitled to claim rent at a higher rate than Rs. 3-5-7. This contention was overruled by the Court of first instance and a decree was made at the rate of Rs. 10 a year. Upon appeal, the District Judge has allowed the contention of the defendants to prevail. The question raised is apparently one of first impression, and the solution must depend upon the true construction of section 48.

The plaintiff has an occupancy holding which contains 12 kanis and 13 gandas of land. In his lease the lands are classified and rent is assessed at rates varying from Rs. 2-4 to Re. 1 a kani; the aggregate rent is stated to be Rs. 21-14 a year. The defendants have taken a lease of one of these plots only, the rent whereof was assessed at Rs. 2-4 a kani in the lease of the plaintiff.

1912

NIM CHAND SAHA v. JOY CHANDRA NATH.

The contention of the defendant is that under section 48, clause (*b*), the plaintiff is not entitled to recover rent at a rate in excess of Rs. 2-13 a kani. In our opinion, there is no foundation for this contention.

Section 48 of the Bengal Tenancy Act provides that the landlord of an under-raiyat holding at a money rent shall not be entitled to recover rent exceeding the rent which he himself pays by more than 25 per cent. It will be observed that the section does not expressly mention the land held by the under-raiyat, but the meaning plainly is that the landlord of the under-raiyat who holds under a money rent is not entitled to recover rent exceeding by more than a quarter the rent which he himself pays in respect of the land let out to the under-raiyat. It has not been disputed that in cases in which the land comprised in the holding of the raiyat is of different qualities and there is no indication to show at what rates the various classes of lands were assessed, section 48 cannot be made applicable, if only a part of the land has been sublet to an under-raiyat. But the learned vakil for the respondent has suggested that where, as here, on the face of the lease of the raiyat the rates at which the different classes of land were assessed can be determined, the under-raiyat is not bound to pay more than 25 per cent. of the rent assessed with respect to the parcels in his possession. This argument, in our opinion, is based on a fallacy. It cannot by affirmed that the raiyat pays so much rent for any particular parcel. No doubt, for the purposes of the assessment of the aggregate rent, certain rates were taken as the basis of the calculation by the superior landlord. Nevertheless, the raiyat holds the entire land of the holding for the aggregate amount. If he fails to pay any portion of this rent, the entire holding is liable to be sold, and he can not clearly save any particular parcel out of the

1912

NIM CHAND SAHA v. JOY CHANDRA NATH.

holding by payment of the rent assessed upon the land comprised therein. In our opinion, section 48 applies to cases in which the land held by the raiyat is co-extensive with the land held by the under-raiyat. The section was never intended to apply to cases of the class now before us.

We may add, that in the course of the argument at the bar, reference was made to the decision of Mr. Justice Geidt in the case of *Akhil Chandra Biswas* v. *Amyad Ali* (1), where a question similar in scope to the one before us, appears to have been raised but not decided; that judgment, so far as it goes, supports the view we take.

The result therefore is that this appeal is allowed, the decree of the Court below set aside and that of the Court of first instance restored with costs in this Court.

S. K. B. *Appeal allowed.*

(1) (1904) S. A. No. 415 of 1903 (unreported).

CIVIL RULE.

Before Mr. Justice Coxe and Mr. Justice Imam.

RASIK LAL MANDAL

v.

SINGHESWAR RAI.*

1912

March. 8.

Hindu Law—Surety—Father's liability as surety—Whether son is liable to pay debt incurred by father as surety.

Under the Hindu Law, a son is liable for a debt incurred by his father as a surety.

Tukarambhat v. *Gangaram Mulchand Gujar* (1) and *Maharaja of Benares* v. *Ramkumar Misir* (2) referred to.

* Civil Rule, No. 368 of 1912, against the order of Ram Lal Das, Subordinate Judge of Purnea, dated Dec. 22, 1911.

(1) (1898) I. L. R. 23 Bom. 454. (2) (1904) I. L. R. 26 All. 611.

1912

RASIK LAL MANDAL v. SINGHESWAR RAI.

RULE granted to the defendant, Rasik Lal Mandal.

One Singheswar Rai brought a suit in the Court of the Subordinate Judge of Purnea exercising the powers of a Small Cause Court, against one Rasik Lal Mandal (the petitioner) for recovery of a sum of Rs. 409-8 including interest at the rate of eighteen per cent. per annum, on the basis of a hand-note, alleging that it was executed in his favour by the deceased father of the defendant as a surety of one Majlis Sahay. The defendant pleaded, *inter alia*, that the bond was not executed by his father, and that if at all executed by him, being without any consideration, it was not binding on him. It appeared that Majlis Sahay had brought a suit for recovery of possession of certain lands, in which the plaintiff Singheswar Rai was added as a party defendant, being a mortgagee of some of the lands in dispute. The suit was settled between the parties, and Majlis Sahay having agreed to pay Rs. 300 to Singheswar Rai, he gave up his rights as a mortgagee. It was for this amount that the hand-note in suit was executed.

The learned Judge, having held that the hand-note was a genuine document, and that it was executed for consideration, decreed the plaintiff's suit. Against this order the defendant moved the High Court and obtained the Rule.

Babu Provas Chunder Mitter (*Babu Sushil Madhub Mullick* with him), for the petitioner. The petitioner is not liable to pay, inasmuch as the hand-note was executed by his father as a surety. Under the Hindu Law a son is not bound to pay such a debt: see Yajnavalkya Sanhita translated by Babu Manmatha Nath Dutt, Chapter II, page 11. Surety is sanctioned in (*i*) *darsana* (presentation), (*ii*) *pratyaya* (creating confidence) and (*iii*) *dana* (giving).

In the third class of cases only a son is liable to pay after the demise of his father. This is not a case coming under that class. Unless the money covenanted to be repaid was a loan, the son is not liable. Manu, Yajnavalkya and other authorities on Hindu Law declare the liability of a son to pay the debts of a father when incurred as surety for payment of debt. The words "security for the payment of debt" clearly contemplate the case of an advance of money: see *The Maharaja of Benares* v. *Ramkumar Misir* (1). The cases of *Sitaramayya* v. *Venkatramanna* (2), *Chettikulam Reddiar* v. *Chettikulam Reddiar* (3), *Tukarambhat* v. *Gangaram Mulchand Gujar* (4) are not against my contention. The case of *Hira Lal Marwari* v. *Chandrabali* (5) lends support to my contention to some extent. In the hand-note, there is no mention of interest, and therefore the plaintiff is not entitled to get interest at the rate of not more than six per cent. per annum.

Babu Satis Chunder Ghose (*Babu Anilendra Nath Roy Chowdhry* with him), for the opposite party, was not called upon to reply on the question of the liability of the son; but as to the question of interest he conceded that interest, at the rate of six per cent., would be the proper rate of interest.

COXE AND IMAM JJ. The facts of the case, as laid before us, are as follows: One Majlis Sahay brought a suit for recovery of certain land over which the plaintiff had a mortgage. In the end it was agreed that Rs. 300 should be paid by Majlis to the plaintiff apparently by way of redemption of this mortgage and the defendant's father agreed to pay that sum in the

(1) (1904) I. L. R. 26 All. 611, 616.
(2) (1888) I. L. R. 11 Mad. 373.
(3) (1905) I. L. R. 28 Mad. 377.
(4) (1898) I. L. R. 23 Bom. 454.
(5) (1908) 13 C. W. N. 9.

1912

RASIK LAL MANDAL v. SINGHESWAR RAI.

event of Majlis' default. The plaintiff thereupon gave up the land. The defendant's father died and the plaintiff then brought this suit against the defendant for the recovery of the money. It was decreed by the Court below and the defendant obtained from this Court a Rule on the opposite party to show cause why the decision should not be set aside on the grounds, *first*, that the debt was incurred by the defendant's father in respect of a suretyship, and, *secondly*, on the ground that the Court had no jurisdiction to award more than six per cent. interest.

As regards the first point, we see no reason why the plaintiff should not be entitled to the relief that he has obtained. We have been referred to Yajnavalkya Sanhita translated by Babu Manmatha Nath Dutt, Chapter II, page 71. It is there stated that "surety is sanctioned in *darsana* (presentation), *pratyaya* (creating confidence) and *dana* (giving). The first two sureties, if their statements be false, must be compelled to repay the money. As regards the other, that is one who undertakes to repay the money himself, if it is not realised from the party, even his sons are to repay the money after his demise." We can see no reason why the suretyship of the defendant's father should not be regarded as coming within the term "dana." In the foot-note to this section, the word "dana" is thus defined :— "The third form of surety is when a person undertakes to repay the money himself if the party for whom he stands surety fails to do so." It has been argued that the obligation created by this form of surety is not binding on the sons unless the money covenanted to be repaid, was a loan. It is difficult for us to see why the obligation of the defendant's father in the circumstances we have described above should be any less than the obligation would have been if

the money had actually been lent to Majlis. In *Tukarambhat* v. *Gangaram Mulchand Gujar* (1), it is stated that Brihaspati recognised four different classes of sureties: (*i*) sureties for appearance, (*ii*) sureties for honesty, (*iii*) sureties for payment of money lent, and (*iv*) sureties for delivery of goods; and stress is laid on the description of the third class as being sureties only for payment of money lent. Further on, however, the Judges say: "The texts of Narad and Yajnavalkya recognise three classes of surety obligation only—those for appearance, those for honesty and those for payment" and it is not said that the money to be repaid must be a loan. As we have said, we see no reason why this class of surety should be restricted only to cases in which money has actually been advanced and no case has been shown where this distinction is clearly laid down. The case of *The Maharaja of Benares* v. *Ramkumar Misir* (2) is clear authority for holding that a surety obligation of this nature is binding on the son even when no money has been advanced. We think, therefore, that the decision of the learned Subordinate Judge in this respect is right.

As regards the question of interest, it is conceded that six per cent. interest is sufficient.

The Rule is accordingly made absolute to this extent that the interest is reduced to the rate of six per cent.

We make no order for costs in this Court. Costs of the Court below will stand.

S. C. G. *Rule absolute.*

(1) (1898) I. L. R. 23. Bom. 454. (2) (1904) I. L. R. 26 All. 611.

APPELLATE CIVIL.

Before Mr. Justice Coxe and Mr. Justice Imam.

1912

March 11.

BAIJ NATH GOENKA

v.

PADMANAND SINGH.*

Res judicata—Execution proceeding—Decision in such proceeding not appealed against—Finality of such decision—Erroneous decision on a question of law, whether res judicata.

A decision in a previous execution proceeding which merely lays down what the law is, and is found to be erroneous, cannot have the force of *res judicata* in a subsequent proceeding for a different relief.

APPEAL by the decree-holder, Baij Nath Goenka.

This appeal arose out of an application for execution of a decree. One Baij Nath Goenka obtained a decree for a certain sum of money aganst Raja Padmanand Singh on the 25th September 1905, who, in order to pay off his debts, sold his estate to his minor son, reserving to himself a monthly allowance of Rs. 4,000. The estate being under the management of the Court of Wards, this allowance was paid to the said Raja by the manager of the estate, Mr. Macgregor. The decree-holder thereupon in execution of his decree attached the monthly allowance. A number of applications were also made by several other decree-holders in the Court of the Subordinate Judge of Bhagalpur for execution of their decrees, and they prayed for rateable distribution of the said monthly allowance. An objection was taken by the judgment-debtor that his monthly allowance could not be attached on the ground that it was a right to future maintenance. The learned Subordinate Judge overruled

*Appeal from order, No. 606 of 1911, against the order of Kishori Mohan Sikdar, Subordinate Judge of Bhagalpur, dated Sept. 14, 1911.

this objection on the 24th April 1909, but permitted the attachment of three quarters of the allowance only, and left the rest for the judgment-debtor to enjoy. No appeal was preferred against the order of the Subordinate Judge. This amount was paid into Court by Mr. Macgregor, and rateable distribution was made amongst the several decree-holders. Baij Nath Goenka by successive applications for execution obtained rateable distribution out of the said sum till about September 1911. In the meantime another creditor of the Raja having applied for execution of his decree by attachment of the allowance, the judgment-debtor took objection to this attachment on the ground that it was not attachable, being a right to future maintenance. The learned Subordinate Judge overruled the objection. On appeal to the High Court, the judgment of the Subordinate Judge was reversed, and it was held that the maintenance allowance could not be attached till it fell due. Thereafter the judgment-debtor, with a copy of the judgment of the High Court, applied to the Subordinate Judge of Bhagalpur that all the execution cases which were pending before him might be dismissed. The decree-holder Baij Nath Goenka objected to his execution case being dismissed, *inter alia*, on the ground that the judgment-debtor was debarred from raising the objection by virtue of the order in the previous execution case, and by his conduct. The learned Subordinate Judge gave effect to this objection of the judgment-debtor and dismissed the execution case. Against that order the decree-holder appealed to the High Court.

Dr. Rashbehary Ghose (*Babu Khetter Mohan Sen* with him), for the appellant. The learned Subordinate Judge released the annuity from attachment on the ground that under the law the annuity was not

1912

BAIJ NATH GOENKA v. PADMANAND SINGH.

liable to attachment. The question is, whether an order in a previous execution proceeding passed by the learned Judge between the same parties that an annuity is liable to attachment would operate as *res judicata* or not; and whether the judgment-debtor having acquiesced in the order which was made, partly in favour of the decree-holder (appellant), and partly in favour of the judgment-debtor, and he having accepted the benefit of it, could now say, that he is not bound by it. The previous decision, although erroneous would operate as *res judicata*. In section 11 of the Code of Civil Procedure (V of 1908), "issues" mean both issues of law and of fact. The Legislature did not make any distinction between a determination of an issue of law and of fact. In the case of *Alimunnissa Chowdhurani* v. *Shama Charan Roy* (1) it was no doubt held that a decision on a question of law cannot operate as *res judicata*. But the question is, if there had been no alteration of law since the previous decision, whether the previous decision would operate as *res judicata*; I submit it would. The learned Chief Justice in the aforesaid case carefully guarded himself against laying down any general principles of law. The cases of *Gowri Koer* v. *Audh Koer* (2), *Rai Churn Ghose* v. *Kumud Mohon Dutta* (3) and *Bishnu Priya Chowdhurani* v. *Bhaba Sundari Debya* (4) support my contention. The cases of *Parthasaradi Ayyangar* v. *Chinnakrishna Ayyangar* (5) and *Chamanlal* v. *Bapu Bhai* (6) seem to be against me; but the facts are distinguishable from the present case. If section 11 of the Code of Civil Procedure (Act V of 1908) is held not to be applicable, then the decision in the previous execution proceeding is, at any rate,

(1) (1905) I. L. R. 32 Calc. 749.
(2) (1884) I. L. R. 10 Calc. 1087.
(3) (1897) I C. W. N. 687.
(4) (1901) I. L. R. 28 Calc. 318.
(5) (1882) I. L. R. 5 Mad. 304.
(6) (1897) I. L. R. 22 Bom. 669.

binding upon the parties upon general principles of law: see *Ram Kirpal* v. *Rup Kuari* (1) and *Mungul Pershad Dichit* v. *Grija Kant Lahiri* (2).

Mr. B. Chakravarti (*Babu Ram Charan Mitter*, *Babu Bepin Behary Ghose* and *Babu D. N. Bagchi* with him), for the respondents. The order that the learned Subordinate Judge passed in the previous execution proceeding was wholly without jurisdiction, and it was not a final order. The present proceeding is not in continuation of the previous proceeding; the previous application for execution was disposed of, and money was realised thereunder. The present proceeding did not refer to the previous proceeding at all. The attachment was in the nature of a prohibitory order; it is not in any sense a final order of the Court. The doctrine of *res judicata* cannot apply, because the subject-matter is not the same; there was no final decision, and the previous decision was not a decision which the Subordinate Judge had jurisdiction to pass. After disposal of the previous application for execution, the attachment came to an end, and the decree-holder made a fresh application for another sum of money and asked for a prohibitory order. The application was registered as a new case, and therefore no question of *res judicata* could arise; see *Namuna Bibi* v. *Rosha Miah*(3) and *Patringa Koer* v. *Madhava Nand Ram*(4). An erroneous decision on a question of law in a previous suit cannot operate as *res judicata*: see *Aghore Nath Mukerjee* v. *Srimati Kamini Debi* (5), *Purna Chandra Sarbajna* v. *Rasik Chandra Chakrabarti* (6) and *Alimunnissa Chowdhurani* v. *Shama Charan Roy* (7).

(1) (1883) I. L. R. 6 All. 269.
(2) (1881) I. L. R. 8 Calc. 51; L. R. 8 I. A. 123.
(3) (1911) I. L. R. 38 Calc. 482.
(4) (1911) 16 C. W. N. 332.
(5) (1909) 11 C. L. J. 461.
(6) (1910) 13 C. L. J. 119.
(7) (1905) I. L. R. 32 Calc. 749.

1912

BAIJ NATH GOENKA v. PADMANAND SINGH.

Babu Kshetter Mohun Sen, in reply.

Cur. adv. vult.

COXE AND IMAM JJ. The appellant in this case in a former execution proceeding attached an allowance payable to the respondent. The attachment was contested, but the case was decided against the respondent and the decision was not appealed against. It is clear that what was sought to be attached in that case was not any particular instalments but the whole allowance as it fell due. Subsequently it has been held in a case between the respondent and another creditor, to which the appellant was not a party, that this allowance could not be attached in this general way, and that instalments could not be attached before they respectively fell due. The appellant again took out execution and the respondent again pleaded that this attachment could not be made. This plea was accepted by the Subordinate Judge and the decree-holder accordingly appeals.

The only point that really arises in the appeal is whether the liability of the allowance to attachment is or is not a *res judicata* between the parties. The former proceeding was an execution in the same suit and was not a former suit, so that section 11 of the Code has no application and the matter must be decided on the principles laid down in *Ram Kirpal* v. *Rup Kuari*(1). The question, however, whether an erroneous decision of law can have the force of a *res judicata* must necessarily be decided on the same principles, whether it arises under section 11 of the Code or in successive execution proceedings. There is considerable divergence of judicial opinion on the point, and we have been referred to numerous cases, of which all the most important are cited in *Aghore*

(1) (1883) I. L. R. 6 All. 269.

Nath Mukerjee v. *Srimati Kamini Debi* (1). The learned Judges there held that an erroneous decision on a point of pure law cannot have the force of a *res judicata* in a subsequent case in which the cause of action is not the same. This decision was followed in *Purna Chandra Sarbajna* v. *Rasik Chandra Chakrabarti* (2). It appears to us that so long as the former decision merely lays down what the law is, it cannot have the force of *res judicata* in a subsequent proceeding to recover different relief. But if it is a decision that is contrary to law, when that expression is used in the wide sense attributed to it, for example, in section 100 of the Civil Procedure Code, it may or may not have the force of a *res judicata*. For instance, in the case *Ram Kirpal* v. *Rup Kuari* (3) cited above, the two proceedings did not relate to the same mesne profits, and in the first the proper construction of the decree of which execution was sought was decided. This would be a question of law under section 100 of the Civil Procedure Code, but the decision did not profess to lay down what the law on the subject was. But when a decision does lay down what the law is and is found to be erroneous, it cannot, in our opinion, have the force of *res judicata* in a subsequent proceeding for different relief. A decision cannot alter the law of the land. *Rai Churn Ghose* v. *Kumud Mohon Dutta Chaudhuri* (4) and *Bishnu Priya Chowdhurani* v. *Bhaba Sundari Debya* (5).

We think, therefore, that although it was decided between the parties in a previous execution proceeding that the allowance could be attached, the Subordinate Judge has no more power now, than he really had then, to attach the allowance before it was due;

(1) (1909) 11 C. L. J. 461.
(2) (1910) 13 C. L. J. 119.
(3) (1883) I. L. R. 6 All. 269.
(4) (1897) I. C. W. N. 687.
(5) (1901) I. L. R. 28 Calc. 318.

1912

BAIJ NATH GOENKA v. PADMANAND SINGH.

and that the former decision cannot alter the law in this respect or give the Subordinate Judge a jurisdiction that he would not otherwise possess.

It has been argued that the judgment-debtor is precluded from attacking the attachment, because in the former proceeding he accepted benefits under it. But we think that there is nothing in this contention. The decree-holder sought to attach the whole allowance, but the executing Court, moved apparently by compassion, permitted the attachment of three-quarters only and left the rest for the judgment-debtor to enjoy. The judgment-debtor may have received this indulgence, which in the view taken by the executing Court was quite unjustifiable; but it certainly cannot preclude him from contesting the whole attachment.

The appeal is accordingly dismissed with costs.

S. C. G.

Appeal dismissed.

CRIMINAL REFERENCE.

Before Mr. Justice Holmwood and Mr. Justice Sharfuddin.

PIKA BEWA

v.

EMPEROR.*

1912

Mar. 13

Causing death by rash or negligent act—Administering of a love potion without knowledge of, or inquiry into, its actual contents—Penal Code (Act XLV of 1860), s. 304A—Statement by accused, when the only evidence in the case, and relied on by the prosecution—Evidentiary value of such statement.

If a person intentionally commits an offence, and consequences beyond his immediate purposes result, the result is not to be attributed to mere rashness : if knowledge cannot be imputed, still the wilful offence does not take the character of rashness because its consequences have been unfortunate, but acts probably or possibly involving danger to others, which in themselves are not offences, may be offences within section 304A and kindred sections if done without due care to guard against dangerous consequences.

Reg. v. *Nidamarti Nagabhushanam* (1), *Empress* v. *Ketabdi Mundul* (2) followed.

Where the only evidence of an offence is a statement by the accused, and it is relied on by the prosecution as evidence thereof it must be taken as a whole, and nothing can be read into it which is not contained therein.

THE appellant, Pika Bewa, was tried before the Sessions Judge of Cuttack, with the aid of assessors, on charges under sections 302, 304 and 304A of the Indian Penal Code, for causing the death of her husband, Prahlad Barik, and of her mother-in-law, Tira Bewa, by administering aconite in their food.

* Criminal Reference No. 6 of 1912, and Criminal Appeal No. 118 of 1912, against the order of L. C. Adami, Sessions Judge of Cuttack, dated Feb. 12, 1912.

(1) (1872) 7 Mad. H. C. 119. (2) (1879) I. L. R. 4 Calc. 764.

1912

PIKA BEWA v. EMPEROR.

One of the assessors found her guilty, but the other not guilty, of murder. The Sessions Judge, agreeing with the former, convicted her of murder, and sentenced her to death.

The facts of the case were as follows. Pika Bewa lived in the house of her husband with her little son, her mother-in-law and Dasa Barik her husband's brother. During this period she had carried on an intrigue with one Maguni, a close neighbour, who was on bad terms, in consequence, with the other members of her family. In October 1911, she was, on account of her conduct with Maguni, sent away to her father's house some 12 miles distant, but returned home unexpectedly on the evening of the 15th November with her son. Next morning she awoke early and paid Maguni a visit at his house, and later on, when he passed by her doors, she went out and spoke to him again, for which she was reprimanded by her mother-in-law. In the evening of the same day she cooked rice and pumpkin curry for the night meal which she served to her husband, mother-in-law and brother-in-law while she gave her son and herself only the rice. Shortly after Tira Bewa complained of a parched tongue, a burning sensation in her mouth, and reeling of the head, and began vomiting. Prahlad also then began to complain of the same symptoms. One Panchu Dhal was thereupon brought in by Dasa, and on his advice Tira was rubbed down with *ghee* which apparently stopped the vomiting, but she died after a little rest. Prahlad then began vomiting, and Dasa spoke of feeling the same sensation as the others had exhibited. He again called in Panchu Dhal who came with Maguni. After rubbing Dasa with *ghee* they went out and brought one Fakir Singh, a *guni* or sorcerer, who administered a decoction to Dasa. Narain Naik, a kobiraj, was then sent for and prescribed for

Dasa, Prahlad having died in the meantime. Dasa ultimately recovered. During the whole of this time Pika sat apart and did not offer to nurse her husband or mother-in-law. She was then taken to the household of Bhai Behari, a neighbour, and on the 18th, she told Behari's wife, who was not examined as a witness in the case, and also two villagers, the prosecution witnesses Nos. 9 and 10, in the absence of the police, that, as her husband and mother-in-law did not like her, she had given them a medicine in the curry, which she had purchased from a Sonthal for two annas, in order to make them love her. She repeated the statement to the Sub Inspector of Police, and was taken to a village called Chotaraipore, a mile away, where she identified a Sonthal named Kuanria as the vendor of the powder or medicine, and the latter after denying the sale admitted it. Pika and Kuanria were then arrested but Maguni absconded.

The Civil Surgeon of Balasore found, on *post mortem* examination, inflammation of the mucous membranes of the stomach and intestines of the deceased, and of the kidneys. No poison was found by the Chemical Examiner in the viscera submitted to him, but traces of aconite were discovered in the vomited matter.

Pika, Maguni and Kuanria were sent up to the Committing Magistrate who, after holding an enquiry, committed Pika to the Sessions under sections 304 and 304A of the Penal Code, and discharged the others. In her examination before the Magistrate she denied illicit intimacy with Maguni and the administering of poison to her husband and mother-in-law, and explained her story to the police about the love drug as having been obtained by mal-treatment. At the trial, when questioned by the Judge, she admitted cooking the rice and curry, but denied putting any poison or love potion in it. She also denied the intrigue with

1912

PIKA BEWA v. EMPEROR.

Maguni, and the purchase of any medicine from a Sonthal, and stated that she did not tell the villagers so. The only direct evidence of the administering of any drug in the food by the appellant was her statement to the two villagers as proved by them at the trial.

Babu Jyotish Chandra Hazra and *Babu Debendra Nath Kumar*, for the accused.

The Deputy Legal Remembrancer (*Mr. Orr*), for the Crown.

HOLMWOOD AND SHARFUDDIN JJ. This is an appeal and reference from the judgment and sentence of the learned Sessions Judge of Cuttack who, agreeing with one assessor and differing from the other, has found the accused, Pika Bewa, guilty of murdering her husband and mother-in-law by aconite poisoning, and sentenced her to be hanged by the neck till she is dead.

In the first place, with regard to the reference on the capital sentence, it is clear that such sentence cannot be carried out inasmuch as there is doubt whether the accused person is or is not pregnant. But in the view which we take of the case this will become immaterial. It is proved to our satisfaction that these two persons died of aconite poisoning, and that another man Dasa, the younger brother of the accused's husband, very nearly met his death, but was apparently saved by the decoction of various local simples which was given to him first of all by a beggar and subsequently by a sorcerer or charmer. We would observe that it would have been most important to examine these persons more carefully as to their knowledge of simple poisons like aconite and opium, and the drugs that they are in the habit of using as antidotes to those poisons, when the antidote of irritant poisons would necessarily be something of a very opposite character

to the antidote in the case of narcotic poisoning; and it does not appear that when these persons were summoned they knew anything more than that the deceased was suffering from symptoms of poisoning, and they say they took the drugs with them. While we are on the subject of defective investigation in this case, we may mention that Bhai Behari's wife was a most important witness who certainly ought to have been examined. There are many other points which ought to have been cleared up so as to leave it without doubt that this woman had knowledge that what the Sonthal and Maguni are alleged to have given her was an irritant poison. Now, the only evidence as to this is Pika's own statement to two villagers whom the Judge and one of the assessors appear to us to have rightly believed, the witness Amrao (P. W. 9), and the witness Hari Saha (P. W. 10). They are also corroborated by the witness No. 11, Udai Narain Singh, who says that the accused identified one Kuanria Manjhi as the person who had given her medicine. Kuanria at first denied giving the accused anything, but afterwards admitted it.

It is in evidence that the accused returned to her home on the night of the 15th November, and the murder took place in the evening of the 16th. On the morning of the 16th there is evidence to show that she went to visit Maguni, and in the afternoon of the 16th Maguni came to her husband's house, and from the evidence of Dasa, witness No. 3 for the prosecution, it would appear that notwithstanding the known intrigue between Maguni and Pika, Maguni was on visiting terms with the whole family. We can have no doubt that whatever poison was administered to the deceased was administered through the instrumentality of Maguni and some Sonthal whom he got hold of to supply the poison. The woman's own

1912

PIKA BEWA v. EMPEROR.

statement is that she did not know that it was poison; she thought it was some charm to procure the love of her husband and her mother-in-law who had been treating her badly. This statement may not seem to be very credible, but it is all the evidence we have; and when the accused's own statement is to be relied upon, it must be taken as a whole, and nothing can be read into it which is not found within the four walls of the statement. We must, therefore, as far as this woman's guilt is concerned, accept her statement that she at the instigation of Maguni obtained some powder, the character of which she was ignorant of and mixed it with pumpkin curry which she knew would be eaten by her husband, her mother-in-law and her husband's brother Dasa with whom she also appears to have been on unfriendly terms. The fact that she herself only ate plain rice and gave her child only plain rice is a very suspicious circumstance against her. She must, therefore, at any rate have been aware that she was committing something dangerous in administering some drug which had been given to her by a man whose relations with her made him an enemy of her husband, and this, we think, is undoubtedly a rash and negligent act within the meaning of section 304A. If she had known that the substance she was administering was an unlawful substance, that is to say, poisonous substance, that would have made a specific offence and in that case section 304A would not apply. If a man intentionally commits any offence and consequences beyond his immediate purposes result, the result is not to be attributed to mere rashness: if knowledge could not be imputed, still the wilful offence does not take the character of rashness because its consequences have been unfortunate; but acts probably or possibly involving danger to others, which in themselves are

not offences, may be offences within the meaning of section 304A and kindred sections, if done without due care to guard against dangerous consequences; and this was the view which was taken by the Madras High Court in *Reg.* v. *Nidamarti Nagabhushanam* (1) which was approved by this Court in the case of *Empress* v. *Ketabdi Mundul* (2).

Now, the mere administering of a love potion or drug, which a person thinks might be beneficial, is not in itself an offence; but when it is supposed to have effect upon persons with whom the paramour of the accused had enmity, and when she administers it without due care and caution or any enquiry as to what it really is, her act certainly falls within section 304A.

We think that the conviction under section 302 cannot be allowed to stand, as the accused is entitled to the benefit of the doubts which we have already adverted to. But we think that she is certainly guilty under section 304A. We think that it has been shown that she is a woman of abandoned character, and richly deserves a more severe punishment than we are able to give her under that section. We, therefore, direct that she be rigorously imprisoned for two years under section 304A, which is the maximum sentence which the law allows under that section. The conviction and sentence under section 302 are set aside.

E. H. M.

(1) (1872) 7 Mad. H. C. 119. (2) (1879) I. L. R. 4 Calc. 764.

APPELLATE CIVIL.

Before Mr. Justice Mookerjee and Mr. Justice Carnduff.

1911

Aug. 21

CHHAKAURI MAHTON

v.

GANGA PRASAD.*

Hindu Law—Father's debts—Execution of decree—Decree against father for damages—Liability of son—Mitakshara Law—Immoral or illegal debt.

A decree obtained by a person for damages on account of injury done to his crops, by the obstruction of a channel through which he was entitled to irrigate his lands, against one B, who was governed by the Mitakshara school of Hindu Law, could be executed on his death against his son, where it could not be said that the decree obtained was due to an act of the judgment-debtor, which was a wanton interference with the rights of the decree-holder, and that the liability imposed thereby on the judgment-debtor was an illegal or immoral debt.

APPEAL by the decree-holders, Chhakauri Mahton and others.

This appeal arose out of an application for execution of a decree. It appeared that one Chhakauri Mahton and others obtained a decree for damages against one Shankar Lall and various other persons on the 23rd March 1908. On appeal by some of the defendants, the decision was affirmed by the High Court on the 27th May 1910. The decree-holders then made an application for execution of the decree, whereupon a writ of attachment was issued and the immoveable properties of the judgment-debtors were attached. On the 22nd September 1910, the return of the service of the writ of attachment was filed. Although objection was taken by some of the judgment-debtors as to the

* APPEAL from order, No. 121 of 1911, against the order of Shashi Bhushan Sen, Subordinate Judge of Gaya, dated Feb. 11, 1911.

proper service of the writ of attachment, Shankar Lall appeared and objected to the execution of the decree on various grounds. On the 3rd December 1910, it was reported to the Court that Shankar Lall had died on the 13th November. The decree-holders then applied to bring on the record the legal representatives of the deceased judgment-debtor. Notices being served upon them, they appeared and objected to the execution of the decree on the ground that as they had obtained the properties by survivorship, no execution could proceed against the properties in their hands. The learned Subordinate Judge gave effect to the objection and rejected the application for execution. Against this order the decree-holders appealed to the High Court.

Babu Golap Chandra Sarkar (*Babu Jogesh Chandra Roy* and *Babu Surendra Nath Guha* with him), for the appellants. The Subordinate Judge is wrong in rejecting the application for execution, inasmuch as the debt was not tainted with illegality or immorality; it was of such a nature as the son was under an obligation to pay. The following cases were cited in support of his argument: *Nanomi Babuasin* v. *Modhun Mohun* (1), *Peary Lal Singh* v. *Chandi Charan Singh* (2), *Shah Wajid Hossain* v. *Nankoo Singh* (3), *Lachmi Dai Koori* v. *Asman Singh* (4), *Khalilul Rahman* v. *Gobind Pershad* (5), *Prayag Sahu* v. *Kasi Sahu* (6), *Narayan Sami Chetti* v. *Samidass Mudali* (7), *Natasayyan* v. *Ponnusami* (8), *Kanemar* v. *Krishna* (9), *Erasala Chetty* v.

(1) (1885) I. L. R. 13 Calc. 21; L. R. 13 I. A. 1.
(2) (1906) 11 C. W. N. 163; 5 C. L. J. 80.
(3) (1876) 25 W. R. 311.
(4) (1876) I. L. R. 2 Calc. 213.
(5) (1892) I. L. R. 20 Calc. 328, 336.
(6) (1910) 11 C. L. J. 599; 14 C. W. N. 659.
(7) (1883) I. L. R. 6 Mad. 293.
(8) (1892) I. L. R. 16 Mad. 99 104.
(9) (1907) I. L. R. 31 Mad. 161.

1911

CHHAKAURI MAHTON v. GANGA PRASAD.

Addepally Chetty (1), *Sumer Singh* v. *Liladhar* (2), *Beni Prashad* v. *Puran Chand* (3), *Tirumalayappa* v. *Veerabudra* (4) and *Jai Kumar* v. *Gauri Nath* (5).

It has been held that a son is bound to pay off the debt of the father incurred as a surety: see *Sitaramayya* v. *Venkatramanna* (6), *Tukarambhat* v. *Gangaram* (7), *Narayan* v. *Venkatacharya* (8), *Maharaja of Benares* v. *Ramkumar Misir* (9) and *Chettikulam Reddiar* v. *Chettikulam Reddiar* (10).

Dr. Rashbehary Ghose (*Babu Mahendra Nath Roy*, *Babu Birai Mohan Mojumdar* and *Babu Harihar Prasad Singh* with him), for the respondents. The son is not liable for the debt of the father, it being a decree against him for damages for cutting a channel. The case of *Durbar Khachar* v. *Khachar Harsur* (11) is exactly in point. The following cases were also cited in support of his contention: *Sita Ram* v. *Zalim Singh* (12), *Narayana Sami Chetti* v. *Samidass Mudali* (13), *Pareman Dass* v. *Bhattu Mahton* (14), *McDowell* v. *Ragava Chetty* (15), *Mahabir Prasad* v. *Basdeo Singh* (16) and *Rateshwar Singh* v. *Gulab Chand* (17).

Cur. adv. vult.

MOOKERJEE J. This appeal is directed against an order by which the Court below has refused an application for execution of a decree for money. The circumstances under which the order in question was made have not formed the subject of controversy in this

(1) (1908) I. L. R. 31 Mad. 472.
(2) (1911) I. L. R. 33 All. 472.
(3) (1895) I. L. R. 23 Calc. 262.
(4) (1909) 19 Mad. L. J. 759.
(5) (1906) I. L. R. 28 All. 718.
(6) (1888) I. L. R. 11 Mad. 373.
(7) (1898) I. L. R. 23 Bom. 454.
(8) (1904) I. L. R. 28 Bom. 408.
(9) (1904) I. L. R. 26 All. 611.
(10) (1905) I. L. R. 28 Mad. 377.
(11) (1908) I. L. R. 32 Bom 348.
(12) (1886) I. L. R. 8 All. 231.
(13) (1883) I. L. R. 6 Mad. 293.
(14) (1897) I. L. R. 24 Calc. 672.
(15) (1903) I. L. R. 27 Mad. 71.
(16) (1884) I. L. R. 6 All. 234.
(17) (1910) 6 Ind. Cas. 582.

Court. On the 23rd March 1908, the appellants before us obtained a decree for money against one Shankar Lall and various other persons as defendants. On appeal to this Court by Shankar Lall and some of the other defendants, the decree was confirmed on the 27th May 1910. On the 5th August following, the decree-holders made an application for execution of the decree, whereupon an order was made for issue of a writ of attachment of the immovable properties of the judgment-debtors. On the 22nd September the return of the service of the writ of attachment was filed, but it is disputed whether the return gave an accurate version of the facts, and whether the writ was, as a matter of fact, properly served. Shankar Lall, however, entered appearance and took objection to the execution on grounds which are not material for our present purpose. On the 3rd December 1910, it was reported to the Court that Shankar Lall had died on the 13th November. The decree-holders then applied to bring on the record the legal representatives of the deceased judgment-debtor. Notice of the application was served upon them, whereupon they appeared and objected that the decree could not be executed against the properties in their hands, which they had obtained by survivorship. The decree-holders answered, *first*, that the legal representatives of Shankar Lall as his sons were liable to satisfy the decree as the debt was neither illegal nor immoral, and, *secondly*, that as the property had been validly attached during the life-time of the deceased judgment-debtor, his right, title and interest, at any rate, could be seized in execution by the decree-holders. The Subordinate Judge overruled both these contentions and dismissed the application for execution upon the authority of the decision in *Darbar Ala* v. *Khachar Oghad* (1); at the same

(1) (1908) I. L. R. 32 Bom. 348.

1911

CHHAKAURI MAHTON v. GANGA PRASAD.

MOOKERJEE J.

time he distinguished the cases of *Erasala Chetty* v. *Addepally Chetty* (1), *Prayag Sahu* v. *Kasi Sahu* (2) and *Peari Lal Singh* v. *Chandi Charan Singh* (3). The decree-holders have now appealed to this Court, and on their behalf the decision of the Subordinate Judge has been challenged on the ground that the debt was not tainted with illegality or immorality, nor with any such impropriety or infirmity as would remove it from the category of debts incurred by a Hindu father which a son is under an obligation to pay. It has been contended further that, in any view, as the attachment had been effected during the life-time of the deceased judgment-debtor, it was competent to the decree-holders to proceed at least against his right, title and interest in the hands of his sons. In answer to these contentions it has been argued by the respondents that the sum sought to be recovered was not a debt, as the deceased judgment-debtor was under no contractual obligation to pay it, and that even if it could be treated as a debt, it was of a character which the sons of the deceased were under no obligation to discharge. Reference has been made by the appellants as well as the respondents to a number of judicial decisions, which, it has been suggested, cannot be easily reconciled. The answers to the questions raised must depend upon the texts as interpreted in the judicial decisions to which I shall presently refer.

According to the Institutes of Manu (VIII, 159), "money due by a surety, or idly promised, or lost at play or due for spirituous liquor or what remains unpaid of a fine and a tax or duty, the son (of the party owing it), shall not be obliged to pay" (Sacred Books of the East, vol. XXV, p. 282).

(1) (1908) I. L. R. 31 Mad. 472.
(2) (1910) 11 C. L. J. 599.
(3) (1906) 5 C. L. J. 80; 11 C. W. N. 163.

To the same effect is the text in the Institutes of Yajnavalkya (II, 47). The son shall not pay the paternal (debts) contracted for wines, lust and gambling, or due on account of the unpaid (portion) of a fine or a toll or (on account of) an idle promise (Mandlik p. 205).

According to Brihaspati, if the father is no longer alive, the debt must be paid by his son ; the father's, debt must be paid first of all, and after that, a man's own debt ; but a debt contracted by the paternal grandfather must always be paid before these two even ; the father's debt on being proved must be paid by the sons as if it were their own ; the grandfather's debt must be paid by his son's sons without interest, but the sons of a grandson need not pay it at all ; sons shall not be made to pay a debt incurred by their father for spirituous liquor, for losses at play, for idle gifts, for promises made under the influence of love or wrath, or for suretyship, nor the balance of a fine or toll liquidated in part by their father (Brihaspati, ch. XI, 47, 48, 49 and 51, Sacred Books of the East, vol. XXXIII, p. 328, Jagannath's Digest, I, 5, 166, 167 and 201, Mayukha by Mandlik, pages 112 and 113).

Again the text of Ushanas cited in the Mitakshara (Commentary on Yajnavalkya, book II, verse 47) as also in the Mayukha (p. 113), runs as follows : " A fine or the balance of a fine, likewise a bribe or a toll or the balance of it are not to be paid by the son, neither shall he discharge a debt which is not lawful." The original word which is rendered " lawful " is *vyavaharika*. There has been some divergence of opinion as to the precise import of this expression. The learned Judges of the Bombay High Court in *Darbar Ala* v. *Khachar Oghad* (1) treat the expression " not *vyavaharika*" as equivalent to " unusual " or " not sanctioned

(1) (1908) I. L. R. 32 Bom. 348.

1911

CHHAKAURI MAHTON v. GANGA PRASAD.

MOOKERJEE J.

by law or custom," and they suggest that this word has crept into our text-books and judicial decisions under the guise or disguise of illegal or immoral. I am not satisfied that the interpretation adopted is quite accurate. On the other hand, I am not prepared to accept the version given by Girish Chandra Tarkalankar, who renders the term "*vyavaharika*" by "necessary for life." I find that Bohtlingk and Roth, Wilson and Monier Williams all take the expression as equivalent to "connected with or relating to an action at law or legal process, customary, usual." Mandlik (p. 113) renders it as "proper." Jogendra Nath Bhattacharyya also renders it as "proper (that is sanctioned by law or custom)." In my opinion, the term "*vyavaharika*" may be accurately rendered as equivalent to "lawful, usual or customary."

Again we have the text of Gautama (Chap. XII, 41) "money due by a surety, a commercial debt, a fee due to the parents of a bride, debts contracted for spirituous liquor or in gambling, and a fine shall not involve the sons of the debtor" (Sacred Books of the East, vol. II, p. 244, where also an extract from the Commentary of Haradatta is quoted).

The text of Vyassa quoted in the Vivada Ratnakar (p. 58) and by Jagannath (1, 5, 203) is substantially to the same effect; "Neither a fine nor a toll nor the balance due for either shall be necessarily paid by the son of a debtor, nor any debt which is not Vyavaharika" (which is rendered by Colebrooke as equivalent to "for a cause repugnant to good morals").

The text of Katyayana quoted by Jagannath is of similar import: "A debt of the paternal grandfather, which is proved or which is partly liquidated, must be discharged (by the grandson), but never shall a debt contracted for immoral uses, or which was contested by his father (be paid by the grandson). Bhrigu

ordains that a debt devolving from the grandfather which was proved and acknowledged by the father must be discharged by grandsons, if it were not contracted for immoral uses nor already paid by the sons :" Jagannath's Digest, vol. I, p. 307) : see also Viramitradoya (Calcutta edition, 1815), p. 100, p. 1, 2, 105, p. 1, 2. 106, p. 1, 109, p. 1, 2, 165, p. 1, 2, 166, p. 1.

If the provisions of all these texts are summarised, the result appears to be that the debts which a son is not under any obligation to pay may be grouped as follows: (i) debts due for spirituous liquor, (ii) debts due for lust, (iii) debts due for gambling, (iv) unpaid fines, (v) unpaid tolls, (vi) useless gifts or promises without consideration or made under the influence of lust or wrath, (vii) suretyship debts, (viii) commercial debts, and (ix) debts that are not *vyavaharika*, *i.e.*, debts that are not lawful, usual, or customary, or, if we accept the version of Colebrooke, debts for a cause repugnant to good morals. This list, it must be conceded, is comprehensive; and as the terms used are not accurately defined there is considerable room for divergence of opinion as is indicated by the extracts from the commentaries, quoted by Jagannath in his Digest. This divergence is faithfully reflected in the judicial decisions to which reference was made in the course of argument, and which I shall now proceed to examine.

In one of the most recent cases in this Court, *Prayag Sahu* v. *Kasi Sahu* (1), the question arose whether the cost awarded by a Court against a defeated litigant was " Danda " within the meaning of the text of Yajnavalkya, " nor is he bound to pay any unpaid fine or toll, or idle gifts" (Mitakshara, Ch. VI, sec. 3, para. 47), or whether it was not *vyavaharika* within the meaning of the text of Ushanas to which we have

(1) (1910) 11 C. L. J. 599.

1911

CHHAKAURI MAHTON v. GANGA PRASAD.

MOOKERJEE J.

already referred. Mr. Justice Chatterjee answered the question in the negative and he relied upon the text of Manu (Ch. VIII, verse 59), which makes the unsuccessful defendant liable not only to satisfy the claim of the plaintiff but also to pay a penalty to the King. On the other hand, the decision in *Ramaiengar* v. *The Secretary of State* (1) supports the contrary view. There a Hindu father had brought a suit in *formâ pauperis* as next friend of one of his infant sons to establish his adoption, but the suit was dismissed on the ground that the alleged adoption had never taken place. The father was ordered to pay the Court-fees due to Government under section 440 of the Code of 1882. The learned Judges held that such costs could not be recovered from the sons, because the liability to pay the costs was imposed as a penalty on the father for his misconduct, namely, the institution of a suit which he must have known to be false; in other words, the liability might be regarded as in the nature of a fine and the debt so incurred be deemed as tainted with immorality. It must be conceded that this decision rests on its own special circumstances, and it cannot be regarded as an authority for the general proposition that the costs awarded against a father in litigation constitutes an immoral debt. This view, indeed, was repudiated in *Sumer Singh* v. *Liladhar* (2), where the learned Judges of the Allahabad High Court held that money borrowed by a Mitakshara father to defend a suit for defamation constitutes a debt for which his son and grandson are liable.

The decision in *Sitaram Pandit* v. *Harihar Pandit* (3) furnishes an illustration of a somewhat different class of cases. There money had been borrowed by the

(1) (1909) 20 Mad. L. J. 89; 6 Mad. L. T. 308.

(2) (1911) I. L. R. 33 All 472; 8 All. L. J. 306.

(3) (1910) 12 Bom. L. R. 910.

father of a boy about to be given in adoption to a Hindu lady. The money was paid as a bribe to the adoptive mother to induce her to take the boy in adoption. It was ruled that the debt so contracted by the father would not bind his son, and the decision was based on the intelligible ground that the debt had been contracted for an illegal purpose, because money paid to an adoptive mother as a bribe to secure her consent to an adoption not on the ground of fitness of the boy, but on motives of pecuniary benefit to herself, must be condemned as an illegal payment.

There has been a well marked divergence of judicial opinion upon the question, how far a Hindu son is under a pious obligation to discharge a debt of his father when such debt consists of money misappropriated by the latter. The cases of *Mohabir Prasad* v. *Basdeo Singh* (1), *Pareman Dass* v. *Bhattu Mahton* (2) and *McDowell* v. *Ragava Chetty* (3) seem to negative the liability of the son under such circumstances, while the cases of *Natasayyan* v. *Ponnusami* (4), *Kanemar* v. *Krishna* (5) and *Erasala Chetty* v. *Addepally Chetty* (6) apparently support the liability of the son. These cases, however, may possibly be reconciled if we recognise the distinction between a criminal offence and a breach of civil duty. In the first three cases, the father was guilty of criminal misappropriation as regards sums of money for which he was accountable; while in the second set of three cases, the father merely failed to account for the money received by him, and his failure to do so constituted nothing more than a breach of civil duty. The distinction is real though refined, and was recognised in

(1) (1884) I. L. R. 6 All. 234.
(2) (1897) I. L. R. 24 Calc. 672.
(3) (1903) I. L. R. 27 Mad. 71.
(4) (1892) I. L. R. 16 Mad. 99.
(5) (1907) I. L. R. 31 Mad. 161.
(6) (1908) I. L. R. 31 Mad. 472.

1911

CHHAKAURI MAHTON v. GANGA PRASAD.

MOOKERJEE J.

Medai Tirumalayappa Moodeliar v. *Veerabudra* (1), where it was ruled that if a debt was incurred by an agent, his son was liable to pay the debt and the liability of the son was not affected by the circumstance that the father subsequently misappropriated the sum or made himself criminally liable. The case last mentioned consequently supports the view that, where the taking of the money itself is not a criminal offence, a subsequent misappropriation by the father cannot discharge the son from his liability to satisfy the debt; but the position is different if the money has been taken by the father and misappropriated under circumstances which render the taking itself a criminal offence.

In *Jai Kumar* v. *Gouri Nath* (2) a question was raised as to the nature of a debt contracted by a Mitakshara father who had given a promissory note to satisfy a *bonâ fide* decree which another had against him; it was ruled that the debt was neither immoral nor illegal, because the promissory note had not been given to stifle a prosecution against him. In an earlier case in the Punjab [*Karter Singh* v. *Harjhimal* (3)] Lindsay and Plowden JJ. ruled that it was impossible to hold that a debt created by a decree is a debt contracted for an illegal or immoral purpose, merely because the act from which the obligation to make compensation arose was an illegal or immoral act, or both illegal and immoral. There the father had stolen and converted to his own use certain property belonging to a third person, who sued and obtained a decree against him for the value of the property. The decree was sought to be executed by attachment of ancestral property in which the son was jointly interested with his father. The son objected to the

(1) (1909) 19 Mad. L. J. 759.
(2) (1906) I. L. R. 28 All. 718.
(3) (1879) P. R. 374 No. 128 of 1879.

attachment, but his objection was overruled. The learned Judges observed that if the father had voluntarily contracted a debt to compensate the person whom he had, by a criminal offence, deprived of property, the debt could not, without an utter perversion of language, be styled a debt contracted for an illegal or immoral purpose; they added that, on the contrary, the debt might be deemed to have been incurred for a highly moral as well as lawful purpose, and that the liability imposed by the decree created an obligation unwillingly contracted by the father under a lawful compulsion, as indicated in *Achhru Ram* v. *Meherchand* (1), where a similar view was taken of the liability of the ancestral estate to satisfy a judgment debt founded upon a just cause.

In the case of *Darbar Ala* v. *Khachar Oghad* (2), the learned Judges of the Bombay High Court appeared to have ruled that, under Hindu law, the son is not to be held liable for debts which the father ought not, as a decent and respectable man, to have incurred; he is answerable for the debts legitimately incurred by his father, and not for those attributable to his failings, follies or caprice. As already stated, the learned Judges appear to have deduced this rule from the text of Ushanas in which they interpreted the expression "not *vyavaharika*" as equivalent to "unusual" or not sanctioned by law or "custom"; this word they suggested, had crept into text-books as "illegal or immoral." This clearly is not well-founded. Text writers, as well as judicial decisions, apply the well-known expression illegal or immoral debt to include, not merely debts which are not *vyavaharika*, but all the debts which are deemed as not payable by the son according to the texts of Manu, Yajnavalkya, Ushanas, Brihaspati, Gautama

(1) S. A. No. 799 of 1875 (Unreported). (2) 1908 I. L. R. 32 Bom. 348.

1911

CHHAKAURI MAHTON v. GANGA PRASAD.

MOOKERJEE J

and Vyasa. The decision of the Bombay High Court, in my opinion, places too restricted a construction upon the term "*vyavaharika*," and excludes debts for which the son may be held legitimately liable. In the particular case before the learned Judges, the father had erected a dam which obstructed the passage of water to the land of the plaintiff; the plaintiff obtained a decree for damages against the father, and on the death of the latter, sought to execute the decree against his son to the extent of the ancestral property in his hand. It was held that, as the result of the suit showed that the act was wrongful, the son could not be held answerable for a liability so incurred. The learned Judges appear to have found that the estate taken by the son had derived no benefit from the wrongful act, but it may be observed that this last reason may possibly be open to the criticism that if the liability of the son depends upon the nature of the act, the test of benefit to the estate becomes immaterial. I am not prepared, however, to hold that because the decision of the suit showed that the act for which the father was held liable in damages was in contravention of the rights of the successful plaintiff, the judgment debt was illegal within the meaning of the texts to which I have referred. I am rather inclined to adopt the view that the liability imposed by the Court upon the father to indemnify the person, with whose property he had improperly interfered, created a debt which might justly be recovered from the ancestral property in the hands of the son. This view may be maintained even if we adopt the distinction suggested by the learned Judges of the Madras High Court between a debt which follows as the result of an offence under the criminal law and a debt for which one is made liable on the ground of a breach of civil duty. The view we take

is supported by the observations of this Court in *Peari Lal Singh* v. *Chandi Charan Singh* (1). In that case, the son was held answerable to satisfy a decree against his father for mesne profits, and, although it was incidentally suggested that the judgment-debtor had, by unlawful receipt of profits, enriched his own estate which subsequently passed by survivorship into the hands of the son, the decision was based substantially on the ground mentioned in *Natasayyan* v. *Ponnusami* (2): "The son is not bound to do anything to relieve his father from the consequence of his own vicious indulgences, but he is surely bound to do that which his father himself would do were it possible, namely, to restore to those lawfully entitled money he had unlawfully retained. Upon any intelligible principle of morality, a debt due by the father by reason of his having retained for himself money which he was bound to pay to another would be a debt of the most sacred obligation, and for the non-discharge of which punishment in a future state might be expected to be inflicted, if in any."

Reference was made at the bar to decisions upon the question of the liability of a son to satisfy a suretyship-debt of his father, and mention was made particularly of the cases of *Tukarambhat* v. *Gangaram* (3), *Narayan* v. *Venkatacharya* (4), *Maharaja of Benares* v. *Ramkumar Misir* (5), *Sitaramayya* v. *Venkatramanna* (6) and *Chettikulam Reddiar* v. *Chettikulam Reddiar* (7). It is not necessary, however, to discuss for our present purpose the question of the liability of a Mitakshara son for the suretyship-debt of his father, because the determination of

(1) (1906) 5 C. L. J. 80; 11 C. W. N. 163.
(2) (1892) I. L. R. 16 Mad. 99, 104.
(3) (1898) I. L. R. 23 Bom. 454.
(4) (1904) I. L. R. 28 Bom. 403.
(5) (1904) I. L. R. 26 All. 611.
(6) (1888) I. L. R. 11 Mad. 373.
(7) (1905) I. L. R. 28 Mad. 377.

1911

CHHAKAURI MAHTON v. GANGA PRASAD.

MOOKERJEE J.

that question depends upon the interpretation of special texts, specially the text of Vishnu, which defines the different kinds of sureties, namely, for appearance, for honesty, for debt and for delivery of the debtor's effect (Jagannath's Digest, Vol. 1, p. 246). But we may observe that the latest decision in this Court [*Hiralal* v. *Chandrabali* (1)] may be difficult to reconcile with cases in Bombay, Allahabad and Madras which we have already mentioned; for the reason already stated, however, it is not necessary to examine further this class of cases.

Reference was also made to the cases of *Shah Wajed Hossein* v. *Nankoo Singh* (2), *Luchmi Dai Koori* v. *Asman Sing* (3), *Nanomi Babuasin* v. *Modhan Mohan* (4), *Khalilul Rahman* v. *Gobind Pershad* (5) and *Beni Pershad* v. *Puran Chand* (6) to shew that when a decree has been made against the father, no question arises as to the nature of the debt for the enforcement of which the decree might have been obtained. The decisions relied upon, however, cannot be treated as authorities for any such sweeping proposition, but they do indicate that debts incurred in transactions, the character of which, as Mr. Justice Pigot puts it in *Khalilul Rahman* v. *Gobind Pershad* (5), is no more than imprudent or unconscientiously imprudent or unreasonable, are debts to which a pious duty attaches under the Mitakshara law. This view can hardly be reconciled with the decision of the learned Judges of the Bombay High Court in *Darbar Ala* v. *Khachar Oghad* (7): *see* also *Sitaram* v.

(1) (1908) 13 C. W. N. 9.

(2) (1876) 25 W. R. 311.

(3) (1896) I. L. R. 2 Calc. 213.

(4) (1885) I. L. R. 13 Calc. 21; L. R. 13 I. A. 1.

(5) (1892) I. L. R. 20 Calc. 328.

(6) (1895) I. L. R. 23 Calc. 262.

(7) (1908) I. L. R. 32 Bom. 348.

Zalim Singh (1) and *Narayansami Chetti* v. *Samidass Mudali* (2).

It has finally been argued that the liability of a Hindu son to pay a debt incurred by his father is restricted to cases in which the debt is the result of a contractual obligation, and in support of this view reference has been made to the observations of the learned Judges who decided the case of *Pareman Dass* v. *Bhattu Mahton* (3). It may be conceded that the term "Rina" literally understood implies a debt or loan (*see* Mitakshara on the Institutes of Yajnavalkya II, 45, 47, 50, 54); but the judicial decisions to which reference has been made indicate that the rule has a much wider application. At any rate, we are not prepared to hold that the rule is inapplicable to cases where, as here, the liability was created by a judicial decision. There is no substantial difference in principle between a case in which a person is under an obligation to repay money which he has actually borrowed and a case in which he is bound to discharge an obligation created by a judgment of Court. It is worthy of note that the dictum in *Pareman Dass* v. *Bhattu Mahton* (3) is of a very qualified character, and fully recognises that a right to damages might be deemed to create a debt even before the suit is brought for its enforcement. In any event, after a decree has been made in favour of the successful plaintiff, he is entitled to realise from his defeated opponent a sum of money precisely in the same manner as if he had actually advanced to the latter a sum of money by way of loan.

The question finally arises, what is the position of the respondents when tested in the light of the principles deducible from the judicial decisions

(1) (1886) I. L. R. 8 All. 231. (2) (1883) I. L. R. 6 Mad. 293.
(3) (1897) I. L. R. 24 Calc. 672, 676.

1911

CHHAKAURI MAHTON v. GANGA PRASAD.

MOOKERJEE J.

which interpret the ancient texts. The Subordinate Judge has not reviewed the circumstances of the litigation which ultimately determined the liability of the defendants-appellants. The facts, however, are beyond controversy and are set out in the judgment of this Court in the suit of 1904. It appears that on the 16th May 1904 the present respondents commenced an action against Shankar Lall and thirty-one other persons for establishment of their right of irrigation by means of a certain water course. The case for the plaintiffs was that there were two villages, Rusulpura and Dhangaon, that the maliks of Rusulpura had a right to store water on a certain portion of the village Dhangaon in a reservoir lying to the north of the village and that the maliks of Dhangaon claimed a right to irrigate their village by a water course coming from the south and running with various diversions through their village up to the north-east. The maliks of Dhangaon alleged that this water course was an artificial channel constructed for the purpose of irrigating the lands of Dhangaon. The substantial dispute between the parties was with regard to the area in Dhangaon over which the maliks of Rusulpura were entitled to store water, and with regard to the manner in which the surplus water of the water course was to be discharged. There was an elaborate enquiry by the Court of first instance, and a decree was made in favour of the plaintiff to the effect that the particular water passage which had been obstructed by the defendants might be opened, so that the excess water of Dhangaon might pass off from its grounds. Upon appeal, the Subordinate Judge substantially affirmed this decree with a slight variation so as to entitle the plaintiffs to put up earthwork at a specified point of the channel, and thus prevent the flow of the water towards the reservoir. Upon second

appeal to this Court, the matter was re-examined in detail, and, although the decree was affirmed, it was held that it was incomplete; a direction was consequently given that an expert engineer should be employed to ascertain the breadth and level of the opening which the plaintiffs claimed should remain unobstructed. After the plaintiffs had been thus successful in this litigation, by which their right of irrigation was established, they commenced an action on the 4th January 1907, against Shankar Lall and the other defendants of the first suit for recovery of damages on account of injury done to their crops by the obstruction of the channel. The proceedings in the original suit including the pleadings and the judgments of all the Courts, were produced at the trial, and the Court made a partial decree for damages. On appeal to this Court, that decree was affirmed on the 27th May 1910. This is the decree of which the plaintiffs have taken out execution, and, as already explained they seek to realise the sum decreed from the sons of Shankar Lall who died during the pendency of the proceedings. It is difficult to appreciate how these latter can successfully resist execution on the ground that the debt is illegal or immoral. Their father, as one of the proprietors of Rusulpura repudiated the claim of the plaintiffs as proprietors of Dhangaon, to exercise the right of irrigation claimed by them. There was substantial matter in controversy between the parties, as is amply indicated by the fact of the protracted investigation in the original court, and even when the litigation terminated after four or five years, an expert was needed to determine the breadth and depth of the channel, so that each of the parties might exercise their right without needless detriment to the other. In no sense could it be said that the act of Shankar

1911

CHHAKAURI MAHTON v. GANGA PRASAD.

MOOKERJEE J.

Lall was a wanton interference with the proprietary rights of another. The successful plaintiffs undoubtedly claimed too much, even if it be conceded that Shankar Lall went to the opposite extreme and entirely denied their rights. I am clearly of opinion that a liability imposed upon Shankar Lall by an act of this character cannot appropriately be deemed an illegal or immoral debt. Even if I were to adopt the view of the learned Judges of the Bombay High Court in *Darbar Ala* v. *Khachar Oghad* (1), I could not say that Shankar Lall ought not to have incurred this liability "as a decent and respectable man," nor could this liability be attributed to "his failings, follies or caprices." In fact what Shankar Lall did would have been done by any ordinary prudent owner of property with a view to prevent the exercise of what was an exaggerated, though not an unfounded, claim by his neighbours. Upon the merits, therefore, I feel no doubt that the debt which the heirs of Shankar Lall are now called upon to satisfy from the ancestral property in their hands cannot be regarded as an illegal or immoral debt.

In this view of the matter, it is unnecessary to consider whether the attachment was properly effected during the life-time of Shankar Lall, because that would enable the appellants to proceed only against the right, title and interest of Shankar Lall in the hands of his sons: see the authorities reviewed in *Peari Lal Singh* v. *Chandi Charan Singh* (2).

The result, therefore, is that this appeal must be allowed, the order of the Subordinate Judge discharged and execution directed to proceed against the ancestral property in the hands of the legal representatives of Shankar Lall. The appellants are entitled to their costs in this Court.

(1) (1908) I. L. R. 32 Bom. 348. (2) (1906) 5 C. L. J. 80; 11 C. W. N. 163.

CARNDUFF J. I agree, and may add that a similar view of what constitutes an "illegal or immoral debt" was taken in an unreported case recently decided by Mr. Justice Woodroffe and myself.

1911

CHHAKAURI MAHTON v. GANGA PRASAD.

S. C. G. *Appeal allowed.*

APPELLATE CIVIL.

Before Mr. Justice Mookerjee and Mr. Justice Carnduff.

MENAJUDDI BISWAS

v.

TOAM MANDAL.*

1911

Nov. 30.

Parties—Execution sale—Reversal of sale—Execution purchaser—Transferee from the purchaser—Civil Procedure Code (Act XIV of 1882), s. 311.

A transferee from the execution purchaser is a necessary party to a proceeding for reversal of the execution sale, when such proceeding is commenced after the transfer has been effected.

Bibi Sharifan v. *Mahomed Hulibuddin* (1) and *In re Hammersmith Rent-charge* (2) referred to.

SECOND APPEAL by Menajuddi Biswas, the plaintiff.

This was a suit by the plaintiff, for recovery of *khas* possession of a plot of 1½ bighas of land on declaration of his *jamai* right thereto. The facts are as follows:

One Arjan Mandal held the said plot of land as tenant in *raiyati* holding under Bhagai Mandal, and on the 26th June 1899 he mortgaged the same to Menajuddi Biswas who, subsequently, in execution of a decree obtained on his mortgage bond, purchased the

* Appeal from Appellate Decree, No. 125 of 1910, against the decree of Radha Nath Sen, Subordinate Judge of Jessore, dated Nov. 29, 1909, affirming the decree of Promotha Nath Bhattacharjee, Munsif of Jhenidah, dated Dec. 19, 1908.

(1) (1911) 13 C. L. J. 535 (2) (1849) 4 Exch. 87.

1911

MENAJUDDI BISWAS v. TOAM MANDAL.

said land on the 20th February 1900 from Arjan Mandal. This sale was confirmed on the 26th March 1910, and Menajuddi Biswas took formal delivery of possession of the said land through the Court and was in actual possession of the same. Thereafter the *jama* having fallen in arrears, and Bhagai having brought a suit against the original tenant, Arjan Mandal, for recovery of the same amount, Menajuddi Biswas deposited the same in Court. Subsequently, on Bhagai's death, Bhagai's heirs, as landlords, again brought a suit for arrears of the *jama* against the original tenant only, and on the 16th July 1906 the said land was sold and purchased by them in execution of their decree. This latter sale was confirmed on the 27th August 1906, and the purchasers obtained delivery of possession of the land from the Court on the 17th January 1907, and have been in possession thereof since then. On the 2nd May 1907 the purchasers sublet the said land to one Toam Mandal. Thereafter Menajuddi Biswas, having become aware of the sale and purchase by Bhagai's heirs, applied under sections 244 and 311 of the Code of Civil Procedure for setting aside the sale. This application was granted and the sale was set aside on the 9th May 1908 by consent of the landlords and the original tenant. Toam Mandal was not made a party to these proceedings, and when requested by Menajuddi Biswas to give up possession of the land in dispute, he refused to comply with the request. Menajuddi Biswas thereupon brought this suit on the 27th June 1908 against Toam Mandal, the landlords and the original tenant.

The defendants contended that there was no cause of action; that the suit was not maintainable in its present form; that the plaintiff's alleged auction-purchase was fraudulent and collusive; that the plaintiff's alleged auction-purchase gave him no valid title to *khas*

possession of the land in dispute, as he was the transferee of an under-raiyat; and that the suit was barred by limitation.

Both the Courts below dismissed the suit. Thereupon, the plaintiff appealed to the High Court.

Babu Narendra Kumar Bose, for the appellant.

Babu Jogendra Nath Mukerjee, for the respondents.

MOOKERJEE AND CARNDUFF JJ. The question of law which calls for decision in this appeal is, whether a transferee from the execution-purchaser is a necessary party to a proceeding for reversal of the execution sale, when such proceeding is commenced after the transfer has been effected.

The circumstances under which the question arises are not disputed. The plaintiff appellant claims to be the tenant of a holding which was sold for arrears of rent by the landlord on the 16th July 1906. The landlord himself became the purchaser, and the sale was confirmed on the 27th August following. He sublet the land to the defendant on the 2nd May 1907. The plaintiff whose interest, if any, had been extinguished by the execution sale subsequently applied for reversal of the sale, and on the 9th May 1908 an order was made by which the sale was cancelled. The order was made by consent of the decree-holder and the judgment-debtor; but the Court added that grounds had been made out for reversal of the sale under section 311 of the Code of 1882. The sub-lessee was not a party to these proceedings, and he naturally declined to vacate the land in favour of the plaintiff. Thereupon, the plaintiff commenced the present action on the 27th June 1908. It is manifest that, as against the sub-lessee of the auction purchaser, the plaintiff has acquired no valid title in spite of the reversal of the sale. The auction purchaser was a necessary party

1911

MENAJUDDI BISWAS v. TOAM MANDAL.

to the proceeding for reversal of the sale: *Bibi Sharifan* v. *Mahomed Habibuddin* (1). At the time when the sale was set aside on the 9th May 1908, the interest of the auction purchaser had partially vested in the sub-lessee, who had acquired a valid title under the lease in his favour. The effect of the order of cancellation of the sale was to affect his interest behind his back. Now it is an elementary principle that no person is to be deprived of his property in any judicial proceeding, unless he has had an opportunity of being heard: *In re Hammersmith Rent-charge* (2). Here the defendant is sought to be affected without an opportunity afforded to him to defend his rights. It is thus plain that the plaintiff has not acquired any valid title as against the sub-lessee of the auction purchaser. The result, therefore, is that the decree made by the Subordinate Judge is affirmed, and this appeal dismissed with costs.

O. M. *Appeal dismissed.*

(1) (1911) 13 C. L. J. 535.

(2) (1849) 4 Exch. 87.

CRIMINAL REVISION.

Before Mr. Justice Carnduff and Mr. Justice Imam

JOGENDRA NATH MOOKERJEE

v.

MATI LAL CHUCKERBUTTY.*

1912

Aug. 2.

Jurisdiction of Magistrate— Charge with a view to commitment, cancellation of—Criminal Procedure Code (Act V of 1898), s. 213 (2)—Cross-examination of prosecution witnesses after framing of the charge, effect of—"Witnesses for the defence," interpretation of—Practice.

It is open to a Magistrate, having drawn up a charge against an accused person with a view to his commitment to the Court of Session, to allow the accused to cross-examine the witnesses for the prosecution and, as the result, to cancel the charge.

The words "witnesses for the defence" in s. 213 (2) of the Code are wide enough to cover evidence elicited in cross examination of witnesses for the prosecution.

Surjya Narain Singh, In re (1) referred to.

THE petitioner, Jogendra Nath Mookerjee, on behalf of Roy Jatindra Nath Chowdhury, his master, laid a complaint before the Subdivisional Magistrate of Basirhat, charging one Mati Lall Chuckerbutty, a *naib* in the service of his master, with criminal breach of trust and falsification of accounts in respect of Rs. 7-8 and odd collected by Mati Lall Chuckerbutty as rent from a tenant named Kedar Sardar. The Subdivisional Magistrate of Basirhat, after examining the prosecution witnesses, drew up charges under ss. 408 and 477 A of the Penal Code. But instead of committing the accused to the Court of Sessions he allowed

* Criminal Revision No. 857 of 1912, against the order of Satyendra Nath Dass, Subdivisional Magistrate of Basirhat, dated April 18, 1912.

(1) (1900) 5 C. W. N. 110, 112.

1912

JOGENDRA NATH MOOKERJEE v. MATI LAL CHUCKERBUTTY.

the prosecution witnesses to be recalled for cross-examination. Thereupon, by his judgment, dated the 23rd of April, 1912, he acquitted the accused of the offence under s. 408 of the Penal Code and cancelled the charge against him under s. 477A.

Against this order the petitioner moved the High Court and obtained this Rule.

Babu Sarat Chandra Roy Chowdhury, for the petitioner.

Babu Haraprasad Chatterjee and *Babu Sajani Kanta Sinha*, for the opposite party.

CARNDUFF AND IMAM JJ. We think that this Rule must be discharged.

The short point raised by it is whether a Magistrate, having drawn up a charge against an accused person with a view to his commitment to the Court of Session, can thereafter allow the accused to cross-examine the witnesses for the prosecution and, as the result, cancel the charge. We are of opinion that it is open to him to take this course.

Section 213, sub-section (*2*) of the Code of Criminal Procedure, 1898, provides that, if a Magistrate, after having drawn up a charge, hears witnesses for the defence and is then satisfied that there are not, after all, sufficient grounds for committing the accused, he may cancel the charge and discharge the accused. No doubt, the sub-section refers to "witnesses for the defence"; but, in our view, those words are wide enough to cover evidence extracted by cross-examination from witnesses for the prosecution. The course taken by the Magistrate seems to us to be clearly within the spirit of the provision, and we consider that it is not unduly straining the words used to put the construction we have indicated upon them. We

find, moreover, that our view is in accordance with that expressed by this Court in *Surjya Narain Singh, In re* (1).

S. K. B. *Rule discharged*

(1) (1900) 5 C. W. N. 110, 112.

1912

JOGENDRA NATH MOOKERJEE *v.* MATI LAL CHUCKERBUTTY.

APPELLATE CIVIL.

Before Mr. Justice Coxe and Mr. Justice Imam.

JHARULA DAS

v.

JALANDHAR THAKUR.*

1912

March 12.

Shebait—Res judicata—Successor of a shebait, when bound by a decree passed against the shebait—Limitation Act (XV of 1877), Sch. II, Art. 124—Hereditary office of a shebait—Adverse possession of the office.

The widow of a *shebait* of a certain temple, who succeeded her deceased husband in that office, mortgaged some land, as also her interest in the temple income, to one J, who obtained a decree on his mortgage on the 24th of September 1880. In execution thereof he put up the temple income for sale, purchased it himself and obtained delivery of possession in 1892. The widow and the next reversioner then brought a suit to set aside the sale on the ground that the property sold was not saleable. That suit was withdrawn with liberty to bring a fresh suit. The widow alone then brought another suit which was dismissed on the ground that it was barred by section 244 of the Code of Civil Procedure (Act XIV of 1882). She having died, the reversioner brought a suit against the said J, on the 3rd of January 1910, for a declaration that he was entitled to the temple income inasmuch as it was not saleable. On objections taken by the defendant that the suit in so far as it related to the temple income was barred by the rule of *res judicata* and by limitation :

Held, that, inasmuch as there was no collusion or dishonesty about the former suits, and as in one of them the plaintiff himself was a party,

* Appeal from Original Decree, No. 152 of 1911, against the decree of Kishori Mohan Sikdar, Subordinate Judge of Bhagalpur, dated April 3, 1911.

1912

JHARULA DAS v. JALANDHAR THAKUR.

the decree passed in the suit against the *shebait* (widow) would bind her successor (the plaintiff), and that therefore the present suit was barred by the rule of *res judicata*.

Held, further, that Art. 124 of Sch. II of the Limitation Act applied to the case, and that as the suit was brought more than twelve years after the date when the defendant obtained possession of the hereditary office by receipt of the temple income, it was barred by limitation.

APPEAL by the defendant, Jharula Das.

One Pratipal Thakur was one of the *shebaits* of a temple, called Singheswarji temple, in the district of Bhagalpur, and had 3½-anna share in the offerings given by the public to the idol of the said temple. He died childless, leaving behind him his widow, Musammat Girimoni, as his sole heiress. She succeeded to the 3½-anna share of the *shebaitship* and to other properties of her deceased husband, including 11½ bighas of *lakheraj* land in mouza Kumarkhand, and 21 bighas of *lakherai* land in mouza Khoksi. On the 29th of Assar 1281 F. S. she executed a mortgage bond in favour of one Jharula Das, by which she mortgaged the aforesaid 21 bighas of *lakherai* land, as also her right to receive the offerings of the temple. On the 11th of Falgoon 1282 F. S. she sold 11 bighas of *lakherai* land in mouza Kumarkhand to the father of the said Jharula Das by a registered *kobala*. On the 24th of September, 188 , Jharula Das obtained a decree on his mortgage bond, and in execution thereof he prayed for the sale of the right of the Musammat to the 3½-anna share of the offerings of the temple. The sale took place on the 20th of November, 1891, and the decree-holder, who was the purchaser, obtained delivery of possession on the 30th of March, 1892. The Musammat and one Bhaiji Thakur then instituted a suit for setting aside the sale on the ground of fraud, and also on the ground that the right to the offerings was not saleable. This suit was withdrawn by them

with liberty to bring a fresh suit. Subsequently, the Musammat bought another suit in which Bhaiji Thakur did not join, and it was dismissed on the ground that it was barred by section 244 of the Code of Civil Procedure. On the death of the Musammat, Bhaiji Thakur instituted the present suit against Jharula Das for recovery of possession of the 11 bighas *lakheraj* land in mouza Kumarkhand, and for the right to receive 3½-anna share of the offerings of the temple as reversionary heir of Pratipal Thakur, deceased. Bhaiji Thakur died after the institution of the suit, and his heirs were substituted in his place. The plaintiff alleged that the aforesaid mortgage bond, the decree, and the sale were all fraudulent transactions, that the Musammat had no legal necessity for executing the bond and for selling the *lakheraj* lands, and that the right to receive the offerings of the temple was not saleable.

The defendant contended, *inter alia*, that the suit was barred by limitation and by the rule of *res judicata*, that the plaintiff was not the next reversionary heir of Pratipal Thakur, that there was legal necessity for the mortgage and the sale, that there was no fraud or collusion, and that the right to receive the offerings was saleable.

The Court of first instance decreed the plaintiff's suit. Against this decision defendant appealed to the High Court.

Dr. Rashbehary Ghose (*Babu Surendra Nath Ghoshal* with him), for the appellant. The *onus* is upon the plaintiff to prove that he brought the suit within 12 years of the death of Musammat Girimoni. He is also to establish his relationship with the deceased lady, as also the non-existence of any preferential heir: see *Kedar Nauth Doss* v. *Protab Chunder*

1912

JHARULA DAS v. JALANDHAR THAKUR.

Doss (1). The suit is barred by limitation. The plaintiff brought the suit on the basis that the office of the *shebait* was hereditary and he inherited that office. Article 124 of Schedule II of the Limitation Act is applicable to this case: see *Pydigantam Jagannadha Row* v. *Rama Doss Patnaik* (2), *Veerabhadra Varaprasada Row* v. *Velanki Venkatadri* (3) and *Radhabai* v. *Anantrav Bhagvant Deshpande* (4). If the office be not hereditary, the suit must fail on the ground that the plaintiff has no title. The adverse possession of the defendant began when he obtained possession of the hereditary office by receipt of the temple income. The suit is also barred by the rule of *res judicata*. The widow fully represented the estate, as she succeeded her deceased husband as *shebait*. The former suit having been dismissed, the widow could not bring another suit claiming the same relief. The *shebaits* with their predecessors and successors formed one continuous representation of the idol. Therefore, in the absence of fraud or collusion, decrees against the *shebaits* would bind their successors: see *Prosunno Kumari Debya* v. *Golab Chand Baboo* (5). The interest of the widow in the hereditary office was sold on the 20th of November, 1891, and was purchased by the defendant who took delivery of possession on the 30th of March, 1892; and the present suit was brought on the 28th of January, 1910, *i.e.*, more than twelve years after the adverse possession had begun; therefore the suit is barred by limitation.

Babu Jogesh Chandra Roy (*Babu Kulwant Shahay* with him), for the respondent. The plaintiff's suit is barred neither by the principle of *res judicata* nor by the law of limitation. The question of the plaintiff's

(1) (1881) I. L. R. 6 Calc. 626, 629.
(2) (1904) I. L. R. 28 Mad. 197.
(3) (1899) 10 Mad. L. J. 114.
(4) (1885) I. L. R. 9 Bom. 198.
(5) (1875) 14 B. L. R. 450; L. R. 2 I. A. 145.

right was not adjudicated upon in the previous suit. Whether a decision between a *shebait* and an outsider is binding on the succeeding *shebait* would depend upon the facts of each case. The plaintiff claims the hereditary office carrying certain emoluments, and here in the case of *Prosunno Kumari Debya* v. *Golab Chand Baboo* (1) differs from the present case. The fact that the plaintiff withdrew the previous suit and his predecessor in that suit prayed for setting aside the sale, is no bar to a subsequent suit for a declaration that by the sale defendant did not acquire any title to the income of the temple. The subject matter of the present suit being distinct from that of the previous suit, the principle of *res judicata* does not apply: see *Sarkum Abu Torab Abdul Waheb* v. *Rahaman Buksh* (2). It is a gross case of fraud. What was purchased by the defendant was only a widow's interest and not trust property. The decree obtained by the defendant was a money decree, and by the sale in execution thereof, the right, title and interest only of the widow passed. The widow had only a personal right of enjoyment to income derived from the temple; see *Mohunt Burm Suroop Dass* v. *Khashee Jha* (3). She had only a life-interest in it. The cause of action arose in this case on the death of the widow, and the suit having been brought within twelve years of her death is not barred by limitation.

Babu Surendra Nath Ghoshal, in reply.

Cur. adv. vult.

COXE AND IMAM JJ. This was a suit brought by one Bhaiji Thakur for recovery of 11 bighas of *lakheraj* land and an interest of 3½ annas in the income derived from offerings in a certain temple. The property

(1) (1875) 14 B. L. R. 450; L. R. 2 I. A. 145.

(2) (1896) I. L. R. 24 Calc. 83.

(3) (1873) 20 W. R. 471.

1912

JHARULA DAS v. JALANDHAR THAKUR.

originally belonged to one Pratipal who was a *shebait* of the temple, and was succeeded in that office by his widow, Girimoni. Girimoni sold the land to the defendant, Jharula Das, in 1282. Previously in 1281 she had mortgaged some other land and her interest in the temple income to the defendant. He sued on the mortgage and obtained a decree on the 24th September 1880. This was before the Transfer of Property Act, and seems to have been no more than an ordinary decree for money. In execution he put up the temple income for sale and bought it himself. He obtained delivery of possession in 1892. Girimoni and the present plaintiff then sued to have the sale set aside on the ground, among others, that the property was not alienable, and in the alternative for a declaration that it would not bind the present plaintiff after Girimoni's death. That suit was ultimately withdrawn with liberty to sue again. Girimoni then sued again, and that suit was dismissed, being held to be barred by section 244 of the then Code. Girimoni then died, and this suit has now been brought by the present plaintiff. It was decreed by the learned Subordinate Judge, and the defendant appeals.

As regards the *lakheraj* land, we have no hesitation in maintaining the decision of the learned Subordinate Judge. That was voluntarily alienated by Girimoni, and the view of the learned Subordinate Judge that there was no legal necessity for any of these transactions has not been contested before us. With respect to this property Girimoni had the ordinary interest of a Hindu widow and not that of a *shebait*, and the land was not the subject of the former suits. The only question therefore that has been argued before us with respect to the land is whether the evidence justifies the findings of the learned Subordinate Judge, that Girimoni died within 12 years

1912

JHARULA DAS v. JALANDHAR THAKUR.

of the suit, and that the present plaintiff is the next reversioner. After reading the evidence we have no doubt at all that the decision of the court below on these two points is correct.

The main question in the appeal is whether the suit, so far as it relates to the temple income. is barred by (*i*) limitation and (*ii*) the rule of *res judicata*. It appears to us that both these questions turn on the point whether Girimoni fully represented the estate, and this point appears to us to be concluded by authority. It cannot be contended for a moment that there was any collusion or dishonesty about the former suits. In one of them the plaintiff himself was a party. And that the decision of a suit, fairly conducted, against a widow binds the reversioners is now well settled (see the cases quoted on page 631 of the 6th volume of the C. L. J.) And when the widow occupies the position of a *shebait*, as in this case, it appears that her sex makes no difference. This was held in *Pydigantam Jagannadha Row* v. *Rama Doss Patnaik* (1) which was followed in *Lilabati Misrain* v. *Bishun Chobey* (2).

There is also authority that decrees against *shebaits* in honest suits bind their successors. The reason of this is explained in *Prosunno Kumari Debya* v. *Golab Chand Baboo* (3), *Gora Chand Lurki* v. *Makhan Lal Chakravarti* (4) and *Lilabati Misrain* v. *Bishun Chobey* (2) quoted above. That reason is that *shebaits* with their predecessors and successors form one continuous representation of the idol, and consequently subsequent *shebaits* are regarded as the same persons in law as their predecessors. If that is so, it seems clear that the plaintiff is bound by the decree passed

(1) (1904) I. L. R. 28 Mad. 197.
(2) (1907) 6 C. L. J. 621.
(3) (1875) 14 B. L. R. 450, L. R. 2 I. A. 145.
(4) (1907) 6 C. L. J. 404.

1912

JHARULA DAS v. JALANDHAR THAKUR.

against the predecessor Girimoni. It is argued that the validity of the defendant's purchase was not decided in that case, which was dismissed on the ground that it was barred by section 244 of the then Code. But if the plaintiff is regarded as the same person in law as Girimoni, this argument must fail. Girimoni, if she liked, could have attacked the sale under section 244 of the Code, and in that event would very probably have won her case. But she advisedly preferred to abandon that line of attack and to rely on a regular suit in which course she was aided and assisted by the plaintiff. Naturally it was held that the suit was barred. But when she had taken this unsuccessful course with her eyes open, she certainly could not thereafter have pleaded that her right to recover the property had not been decided—and that she was entitled to bring another suit for the purpose of recovering it. And if the plaintiff is regarded by the eye of the law as the same as Girimoni, it is evident that he cannot do so either, more especially perhaps when he aided Girimoni to bring the unsuccessful suit. It appears to us that the right of the *shebaits* generally to recover the property was finally extinguished by the decision in the former suit.

It is clear also that the adverse possession runs from the delivery of possession to the defendant, and that the suit is long barred. The case clearly comes under Article 124 of the Schedule to the Limitation Act: see *Gnanasambanda Pandara Sannadhi* v. *Velu Pandaram* (1). In that case the contention that a subsequent *shebait* obtained a fresh start in the calculation of adverse possession was distinctly overruled. The case of *Pydigantam Jagannadha Row* v. *Rama Doss Patnaik* (2), quoted above, which was followed in

(1) (1899) I. L. R. 23 Mad. 271; L. R. 27 I. A. 69.

(2) (1904) I. L. R. 28 Mad. 197.

Lilabati Misrain v. *Bishun Chowbey* (1), seems to us quite indistinguishable from this case, and is a clear authority that the suit is barred by Article 124. We have been referred also to *Veerabhadra Varaprasada Row* v. *Vellanki Venkatadri* (2), in which it was held following the Full Bench decision in *Radhabai* v. *Anantrav Bhagvant Deshpande* (3) that in a suit for the income of a hereditary office a preceding holder fully represents his successors in matters of *res judicata* and limitation.

We need not go into the question how the rights of the plaintiff are affected by the fact that his own suit was withdrawn. It appears to us that when it is clearly proved that the defendant has been in possession of the property in suit since 1892, and that a suit by the then trustee of the property for recovery was finally dismissed in 1898, the present suit, so far as it affects the $3\frac{1}{2}$ annas of the *shebaiti*, is barred both by limitation and by the principle of *res judicata*. Accordingly the appeal will be allowed in part. The decree of the Subordinate Judge so far as it directs the recovery of possession of the 11 bighas with mesne profits from the date of the suit, to be hereafter ascertained, is affirmed; and so far as it relates to the *shebaiti* and the profits arising therefrom, is set aside.

Costs of both Courts will be awarded to the respective parties in proportion to their success, the calculation being based on the valuation of the relief sought in the plaint.

S. C. G. *Appeal allowed in part.*

(1) (1907) 6 C. L. J. 621. (2) (1899) 10 Mad. L. J. 114.
(3) (1885) I. L. R. 9 Bom. 198.

APPELLATE CRIMINAL.

Before Mr. Justice Holmwood and Mr. Justice Sharfuddin.

1912

March 13.

KUNJA BHUIYA

v.

EMPEROR.*

Rioting—Common object not unlawful—Entering upon land held jointly by the judgment-debtors to take symbolical possession thereof—Right of private defence—Liability of a person for individual acts done in excess of such right—Power of Appellate Court to alter a finding of acquittal under ss. $\frac{325}{34}$ of the Penal Code into one of conviction under s. 323—Penal Code (Act XLV of 1860), ss. 99, 147 and 323—Criminal Procedure Code (Act V of 1898), s. 423.

WHERE a body of about 10 men, belonging to the decree-holder's party, went with the Civil Court officers upon a plot of land in the joint possession of the judgment-debtors to take symbolical possession thereof, and the drummer was assaulted by one of the latter, whereupon the appellants and their party replied by an attack on their opponents, during the course of which one of the appellants' party, not before the Court, fractured the skull of the drummer's assailant by an isolated act, but the appellants continued to beat him after he had fallen helpless on the ground :

Held, that the appellants had a right of private defence under the circumstances, that their common object was, therefore, not unlawful, and that the conviction under s. 147 of the Penal Code was bad, but that, having exceeded such right by beating the wounded man after he had fallen, they were guilty under s. 323.

When an attack is made on persons acting in the lawful exercise of their right over property, they are entitled to the right of private defence, and the only question that arises thereafter is whether any member of the party individually exceeded the right. Persons exercising their lawful rights are not members of an unlawful assembly, nor can the assembly become unlawful by their repelling an attack made on them by persons who had no right to obstruct them, nor by exceeding the lawful use of their right of private defence. In such a case each is liable only for his individual acts done in excess of such right.

* Criminal Appeal, No. 16 of 1912, against the order of J. Cornes, Sessions Judge of Midnapore, dated Dec. 16, 1911.

1912

KUNJA BHUIYA v. EMPEROR.

When an accused charged under ss. 147 and $\frac{325}{34}$ of the Penal Code is convicted of the former and acquitted of the latter offence, the Appellate Court has power to acquit him of rioting, and convict him of hurt under s. 323.

THE appellants were tried, with one Ramanath Bhuiya, by the Sessions Judge of Midnapore with the aid of Assessors, arraigned under ss. 147, $\frac{304}{149}$ and $\frac{325}{34}$ of the Penal Code. The charge under ss. $\frac{304}{149}$ was abandoned, and the Assessors acquitted Ramanath altogether, and also the appellants of the offence under ss. $\frac{325}{34}$, but convicted the latter under s. 147. The Sessions Judge, agreeing with them, sentenced the appellants, under s. 147, to two years' rigorous imprisonment.

The appellants were members of a joint family, of which Ramanath was the *karta*, and had obtained a decree against Lachman Santal and his brothers. The prosecution story was that Bariar, the step-brother of Lachman, had for the last three or four years separated in mess and was in exclusive possession of some four or five bighas of the family property. It was alleged that about noon, on the 9th September 1911, the appellants and others of his party, about ten in number, some of whom were armed with *lathis*, went with four chowkidars, a peon and a drummer upon the land claimed by Bariar as his own to take symbolical possession thereof, that on arrival there Ramanath planted a bamboo on the land and ordered the drummer Bepin to beat the drum, whereupon Bariar called out to his two nephews for assistance and threatened to beat Bepin, that the latter ran away, and Chaku then taking the drum began to beat it when Bariar pushed or struck him with a *lathi*, that thereupon the appellants and five others attacked Bariar with their *lathis*, under the orders of Ramanath, or, as some of the prosecution witnesses stated, of Panchu, that Bariar retreated and as he did so Srinibas rushed out and struck him on

1912

KUNJA BHUIYA v. EMPEROR.

the head fracturing his skull and felling him to the ground, that the seven continued to beat him as he lay helpless, and that some of them also beat Lal Mohun slightly. Bariar died the same night.

The Sessions Judge found that the land claimed by Bariar was not in his exclusive possession, that the blow inflicted by Srinibas was his individual act for which the appellants were not responsible under s. 149 of the Penal Code, and that the same remarks applied to the charge under ss. $\frac{325}{34}$, as none of the contusions found on Bariar were severe.

The common object specified in the charge under s. 147 was "to enforce the right or the supposed right on Bariar's land by beating him and Lal Mohun." The charge under ss. $\frac{325}{34}$ was "that you..... voluntarily caused grievous hurt to Bariar, and thereby committed an offence punishable under ss. $\frac{325}{34}$ of the Penal Code."

The material portions of the judgment of the Sessions Judge were as follows:

There is no doubt that the party of the accused consisted of more than five persons. It remains then to be considered whether this was an unlawful assembly and committed riot (*sic*) with the common object of enforcing their right or supposed right to the land. In the first place the question of Bariar's exclusive title to the land may be considered. . . . (He then dealt with the evidence on the point and continued) I must hold then that Bariar had no separate right to the land sought to be attached, and that the accused's party was perfectly in their right in attempting to attach it. They may have exceeded their right slightly when they proceeded with the necessary acts after objection was taken, but I would not lay any stress on this. The point is, what exactly happened? . . . I think that the accused's party had in fact had drums beaten and planted bamboos before the fight arose. The defence then have to fall back upon the position that Bariar was responsible for the disturbance, as he hit Chaku with a *lathi*; that the attitude of Bariar's party then became threatening, that actual attacks were made and that any blows inflicted upon them were only given in self-defence, or because the accused thought that worse was to come. As to this we get from the chowkidar that Bariar gave a push with his *lathi* to Chaku, probably a slight one. The accused then had exceeded their right in entering on the land, though only slightly. Bariar gave a slight blow to Chaku,

which he was not strictly justified in doing. On the complainant's side, by this time, Bariar, Gour Santal and Lal Mohun were there. The point seems to me to be who made the next attack? If the accused did, then I think they put themselves entirely in the wrong, unless they were under an immediate apprehension that a serious assault was going to be made upon them by the other party. This is merely a question of weighing the evidence. The Assessors have found that accused's party did in fact make such an attack, and this appears correct. It is urged that men of accused's party were injured. This is true, but there is nothing to show that the injuries were not given by the complainant's party in self-defence. On the other hand the Accused's party largely exceeded the complainant's party, and it is exceedingly doubtful if the latter could have ventured to make an attack upon them. Accused too seem to have gone with a strong force and armed with *lathis* to overcome opposition if offered. It is urged that they only did it for self-protection, as the complainant was known to be a violent man. This may be true to a certain extent, but they need not have anticipated any violence if they only intended to do as much as they were legally entitled to, and, therefore, when they started, their real intention was to put through the symbolical possession at all costs, and they probably thought that the display of force would be sufficient in itself to overawe all opposition. In this they made a miscalculation, and were led into employing this force actively, and this too tended to put them in the wrong. . . . . I think that, at any rate, Kunjo and Panchu did become members of an unlawful assembly, that the common object specified in the charge has been made out, and that these two men committed rioting.

Mr. Monnier (with him *Babu Bidhu Bhushan Ganguli* and *Babu Hirendra Nath Ganguli*), for the appellants. The Judge having found that Bariar was not in exclusive possession of the land attached, the common object specified in the charge failed, as it is based on the assumption that it was Bariar's land. The Judge was wrong in holding that the appellants exceeded their right of private defence by entering upon the land belonging to the judgment-debtors jointly, simply because Bariar objected to their doing so. They were not bound to desist from proceeding with the execution. The Judge was also in error in holding that if, upon being resisted by Bariar, the appellants next attacked him, they acted unjustifiably

1912

KUNJA BHUIYA v. EMPEROR.

and lost their right. The common object was to take symbolical possession, which they had a right to do. It was a lawful common object, and, therefore, the conviction under section 147 is bad. If there was an excess of the use of the right of private defence each person would be individually liable for his acts.

The Deputy Legal Remembrancer (*Mr. Orr*), for the Crown. The appellants had no right to go upon the land when Bariar objected, but should have gone to the proper authorities for their remedy. In any case they exceeded their right of private defence, as they continued to beat the deceased after he had been struck down by Srinibas and lay on the ground with a fractured skull.

Mr. Monnier, in reply. The appellants were acquitted under section 325 read with section 34, and cannot now be convicted thereunder: see *Lal Mohan Mandal* v. *Kali Kishore Bhuimali* (1), though the case may possibly be distinguished.

HOLMWOOD AND SHARFUDDIN JJ. This is an appeal from the judgment and sentence of the learned Sessions Judge of Midnapore, who, agreeing with both the Assessors, found the appellants, Kunja Bhuiya and Panchu Bhuiya, guilty of the offence of rioting under section 147, and sentenced them to two years' rigorous imprisonment each. There were charges under sections 304 read with 149, and 325 read with 34, of the Penal Code in respect of the injuries caused to one Bariar who met his death in consequence of the assault. The learned Judge finding that the fracture of the skull which caused the death was an isolated act committed by one Srinibas, and finding also that the charge under section 304 read with 149 was withdrawn, did not take the Assessors' opinion on it, but he says in his judgment,

(1) (1910) I. L. R. 38 Calc. 293.

and we think erroneously, considering the findings which we shall shortly have to come to, that the same remarks really apply to the charge under section 325 read with 34, as none of the contusions found on Bariar were severe.

Now, what is really found in this case is that the accused party were justified in going to the land with the peon who had a warrant in execution of a Civil Court decree, and that they were interfered with, and one of their number, the drummer, was pushed or struck with a *lathi* by the deceased Bariar who had come out from his house with a party of his adherents and opposed the lawful delivery of possession. This is what gave the appellants' party the right of private defence, and the Judge seems to change his mind more than once as to whether they had this right of private defence or not, and he finally seems to come to the conclusion that the assembly became unlawful by reason of the accused retaliating when they were obstructed in the lawful exercise of their right, and he then seems to think that they made an independent attack upon the deceased's party, and that the deceased's party then also had a right of private defence. We confess we are unable to follow the reasoning of the learned Judge. Once an attack was made on persons in the lawful exercise of their right over the property in question, they were undoubtedly entitled to the right of private defence, and the only question which can arise after that is whether any members of the party individually exceeded that right. People who were in the exercise of lawful rights cannot be held to have been members of an unlawful, assembly, nor can that assembly become unlawful, by reason of their repelling the attack made upon them by persons who had no right to obstruct them, nor by reason of their exceeding the lawful use of the right they had.

1912

KUNJA BHUIYA v. EMPEROR.

We have laid down before, and we desire to lay down again, that the fact of exceeding the right of private defence which a man has cannot make him a member of an unlawful assembly, and he can only be convicted and punished for the individual act which he himself has done in excess of the right of private defence; and it is because we think that these two appellants, Kunja and Panchu, did exceed that right, in that they continued to beat Bariar with *lathis* after he had been struck down with a fractured skull and was lying in the water in a practically moribund condition, that we have to consider the question of law which we just now pointed out had been wrongly decided by the learned Judge with reference to the charge under section 325 read with section 34. That charge includes the charge under section 323, and, notwithstanding the finding of acquittal under section 325, we can, on the whole case being open to us on the charges originally framed, convict and punish any of these appellants on any fact which may be found against him under section 323. What they have been acquitted of is causing fracture to the skull of Bariar, but they have not been acquitted of causing simple hurt in a cruel and unnecessary manner after the deceased had fallen and was incapable of rising. For this, we think, they deserve a severe punishment; and while we are obliged to set aside the conviction and sentence under section 147 as being illegal, we think that it is within our power, and also distinctly our duty, to convict the appellants under section 323.

We accordingly direct that the appellants Kunja Bhuiya and Panchu Bhuiya be rigorously imprisoned for one year under 323 of the Indian Penal Code. With this modification the appeals are dismissed.

E. H. M. *Sentence modified.*

APPELLATE CIVIL.

Before Justice Sir Richard Harington and Justice Sir Asutosh Mookerjee.

BIRENDRA KISHORE MANIKYA

v.

BHUBANESWARI.*

1912

March 14.

Landlord and Tenant—Ejectment—Recorded tenant—Effect of denial of tenancy by him on his unrecorded co-sharer—Forfeiture.

In a suit for ejectment based on the ground of forfeiture by reason of the denial of the landlord's title, it was found that the denial was by the recorded tenant and not by his unrecorded co-sharers in the tenancy :

Held, that a person, representing the tenancy in the books of the landlord, was entitled to bind his co-sharers for the purposes of the tenancy ; but when he repudiated the tenancy, he must be taken to have acted beyond the scope of his authority ; his disclaimer, consequently, could not operate as a forfeiture of the tenancy.

SECOND APPEAL by Maharaja Birendra Kishore Manikya Bahadur, the plaintiff.

Defendants Nos. 1, 2 and 3 were the owners of a holding in the plaintiff's zamindari, but only defendant No. I was recorded as tenant in the plaintiff's books. The plaintiff had in 1904 instituted a suit against defendant No. 1 for rent due in respect of the holding, but on his denial of the plaintiff's title as landlord the suit was dismissed in 1905. The plaintiff then instituted the present suit in 1908 against the defendants for recovery of *khas* possession of the land, on the ground that, by reason of the defendant's denial of the plaintiff's title as landlord, the tenancy was forfeited. In

* Appeal from Appellate Decree, No. 322 of 1910, against the decree of Jogendra Nath Bose, Subordinate Judge of Noakhali, dated Nov. 18, 1909, modifying the decree of Subodh Kumar Bhuttacharjee, Munsif of Feni, dated March 8, 1909.

1912

BIRENDRA KISHORE MANIKYA v. BHUBANESWARI.

the alterative the plaintiff prayed for assessment of rent under section 157 of the Bengal Tenancy Act.

The Munsif found that inasmuch as there was a dispute as to the area and boundaries of the land comprised in the suit for rent, the defence of the defendant No. 1 in that suit was *bonâ fide* and that the defendants Nos. 2 and 3 had never denied the plaintiff's title, and so the tenancy could not be forfeited. Upon these findings he dismissed the suit for *khas* possession. On the question of assessment of rent the Munsif refused to pass a decree in favour of the plaintiff, on the ground that the plaintiff had not included in the suit a portion of the land comprised in the defendant's holding.

On appeal, the Subordinate Judge held that though the denial by defendant No. 1 of the plaintiff's title could not affect the position of his co-sharers—the defendants Nos. 2 and 3—the tenancy, so far as defendant No. I was concerned, was forfeited, and that the plaintiff was entitled to *khas* possession as against that defendant. The learned Subordinate Judge passed a decree for ejectment against defendant No. 1 only, and dismissed the suit against defendants Nos. 2 and 3.

The plaintiff, thereupon, preferred this second appeal to the High Court.

Babu Dwarkanath Chuckerbutty and *Babu Gobinda Chandra Dé Roy*, for the appellant.

Babu Khitish Chandra Sen, for the respondents.

HARINGTON AND MOOKERJEE JJ. This is an appeal on behalf of the plaintiff in a suit for ejectment, and, in the alternative, for assessment of rent under section 157 of the Bengal Tenancy Act.

It appears that the first defendant alone is registered as tenant in respect of the disputed land in the books of the landlord, though the second and the

third defendants also are jointly interested in the tenancy. The plaintiff sued the first defendant for recovery of arrears of rent. That defendant denied the title of the plaintiff, and the result was that the action for rent was dismissed. The plaintiff now sues to eject all the defendants on the ground that the tenancy has been forfeited by disclaimer. He also prays that, if the tenancy has not been forfeited, fair and equitable rent may be assessed.

The Court of first instance declared the title of the plaintiff, but dismissed the claim both for possession and assessment of rent. Upon appeal by the plaintiff, the Subordinate Judge has declared that the title of the first defendant as tenant has been forfeited; but he has held that the plaintiff is not entitled to a decree for possession, as the second and third defendants are not liable to be ejected.

In the present appeal, it has been argued on behalf of the plaintiff that the tenancy has been forfeited, and that he is entitled to eject all the three defendants. It has been contended in substance that as the first defendant was allowed by the co-sharers to represent them in the books of the landlord, the disclaimer by him operates as a forfeiture of the tenancy in respect of all the persons interested therein. In our opinion, this argument is obviously fallacious.

It may be conceded that as the first defendant represented the tenancy in the books of the landlord, he was entitled to bind his co-sharers for the purposes of the tenancy; but when he repudiated the tenancy, he must be taken to have acted beyond the scope of his authority. Consequently, his disclaimer cannot operate as a forfeiture of the tenancy in so far as the second and third defendants are concerned. It is further clear that there cannot be a forfeiture of the tenancy in part. The position, therefore, is that the

1912

BIRENDRA KISHORE MANIKYA v. BHUBANESWARI.

tenancy still subsists, and the suit for ejectment must fail. But there is no reason why the plaintiff should not realise rent from all the defendants on the footing that the tenancy still continues.

The result is, that the decree of the Subordinate Judge is discharged; and in lieu thereof it is declared that the claim for ejectment must be dismissed. The case is remanded to the Court of first instance, in order that the plaint may be amended and the rent payable in respect of the tenancy determined. The defendants are entitled to their costs of this appeal as also of the appeal before the Subordinate Judge. The costs in the Court of first instance will abide the result.

S. K. B. *Case remanded.*

APPELLATE CIVIL.

Before Justice Sir Cecil Brett and Mr. Justice Carnduff.

1912

March 19.

TRINAYANI DASI

v.

KRISHNA LAL DE.*

Court-fee—Court-fees Act (VII of 1870), s. 8 and Sch. II, Art. 17, cl. vi —Land Acquisition Act (I of 1894), s. 32—Land Acquisition Judge, order of—Appeal—Debutter property—Memorandum of appeal—Ad valorem fee—Award.

A certain *debutter* property having been acquired under the Land Acquisition Act, the compensation money allowed by the Collector was deposited in Court. One *T* applied to withdraw that amount on the ground that she was entitled to it as executrix to the will of her late husband. On objection by one *K* that the money in deposit should be invested in Government securities and only the interest should be paid over to the *shebait*,

* APPEALS from Original Decrees, Nos. 135 and 136 of 1910, against the decree of A. Goodeve, Special Land Acquisition Judge of 24-Parganas, dated Nov. 15, 1909.

1912

TRINAYANI DASI v. KRISHNA LAL DE.

the Land Acquisition Judge passed an order under section 32 of the Act directing the payment of interest only to the applicant. Against this order *T* preferred an appeal to the High Court on a court-fee stamp of ten rupees only :

Held, that the case came under the provisions of section 8 of the Court-fees Act, and an *ad valorem* court-fee ought to have been paid.

Sheorattan Rai v. *Mohri* (1) and *Kasturi Chetti* v. *Deputy Collector, Bellary* (2) referred to.

Held, also, that to bring a case under the provisions of cl. VI of Art. 17 of Sch. II of the Court-fees Act, it must be established that it was not possible even to state approximately a money value for the subject-matter in dispute ; but where the claim to receive the full amount of compensation money was disallowed, and the only relief allowed by the Court was to withdraw the interest on the said money, there it was possible to state approximately the money value of the relief claimed, and therefore in such a case the provisions of Sch. II, Art. 17, cl. vi of the Court-fees Act would not apply.

Bunwari Lal v. *Daya Sunker Misser* (3) followed.

APPEALS by the applicant, Sreemati Trinayani Dasi.

Two houses belonging to the estate of one Nanda Lal Dey, deceased, having been acquired under the Land Acquisition Act, the compensation money allowed by the Land Acquisition Deputy Collector was sent to the Court of the Special Land Acquisition Judge to be kept in deposit. Sreemati Trinayani Dasi, the widow of Nanda Lal Dey, made an application to that Court to withdraw the money in deposit, alleging that she was entitled to the whole of the compensation money, as under the will of her late husband she and her son Lal Gopal Dey, who died subsequently, were appointed executors, and after the death of her sons he became the sole surviving executrix. Sreemati Mohamaya Dasi, widow of the deceased Lal Gopal Dey for self and as guardian *ad litem* of her minor sons Krishna Lal Dey and others, objected to the money being made over to Sreemati Trinayani

(1) (1899) I. L. R. 21 All. 354. (2) (1898) I. L. R. 21 Mad. 269.
(3) (1909) 13 C. W. N. 815.

1912

TRINAYANI DASI v. KRISHNA LAL DE.

Dasi on the ground that the property acquired being *debutter* property dedicated to Sri Sri Sridhar Jiu Thakur, under the will of Nanda Lal Dey, deceased, and the said Trinayani Dasi being only the *shebait* of the Thakur, under the provisions of section 32 of the Land Acquisition Act the said money could not be given to her, and that the money should be invested in Government securities or in the purchase of other landed properties to be held as *debutter*.

The learned Judge gave effect to the objections and directed that the money should be invested in Government securities, and that the applicant would be entitled to withdraw only the interest thereon.

Against this order relating to the compensation money for the aforesaid two houses, the applicant preferred two appeals to the High Court, each on a court-fee stamp of rupees ten.

Babu Prakásh Chandra Mazumdar, for the respondent, took a preliminary objection that the appeals were not properly before the Court, inasmuch as they were filed on court-fee stamps of ten rupees each. The applicant applied to withdraw the money, alleging that she was entitled to it absolutely, and it being refused, the appeal was preferred against the award, and therefore *ad-valorem* court-fee ought to have been paid. The case is governed by section 8 of the Court-fees Act. I rely on the cases of *Sheorattan Rai* v. *Mohri* (1) and *Kasturi Chetti* v. *Deputy Collector, Bellary* (2). Here the appellant says that she is entitled to withdraw the whole money; that being so, there is no difficulty to ascertain the money-value of the appeal, and therefore the case does not come under clause vi of Art. 17, Sch. II of the Limitation Act: see *Bunwari Lal* v. *Daya Sunker Misser* (3).

(1) (1899) I. L. R. 21 All. 354. (2) (1898) I. L. R. 21 Mad. 269.
(3) (1909) 13 C. W. N. 815.

Babu Surendra Chandra Sen (with him *Babu Dwijendra Nath Mukherjee*), for the appellant. Rupees ten is the proper court-fee, inasmuch as it is not possible to estimate at a money-value the subject-matter in dispute, and this is not specifically provided for in the Court-fees Act, and therefore the case comes within clause vi of Art. 17 of Sch. II of the Act. The plaintiff is the executrix to the will of the deceased Nanda Lal Dey, and by his will she is the *shebait* of the idol. There is no dispute that the idol is the proprietor of the money sought to be withdrawn. Appellant's right to withdraw the money is not on her own account, and therefore no money-value can be assigned to her claim. Section 8 of the Court-fees Act has no application whatsoever to the present case; it contemplates a case where there is a question as to the difference between the amount awarded and the amount claimed relating to compensation for the acquisition of land. Here the appellant does not raise any question as to the amount of compensation; the only question is as to whether the money should remain with the Court or with the claimant, who does not profess to have and has no personal claim to the same.

BRETT AND CARNDUFF JJ. In these appeals, the appellant seeks to have set aside an order passed by the Special Land Acquisition Judge of the 24-Parganas under the provisions of section 32 of the Land Acquisition Act.

The property in respect of which compensation was awarded by the Collector was a portion of property which had been devoted to an idol. Out of this *debutter* property two houses have been acquired by Government for public purposes. In the case out of which appeal No. 135 of 1910 arises, the house and

1912

TRINAYANI DASI v. KRISHNA LAL DE.

the land attached are No. 40, Champatola 1st Lane; and in the case out of which appeal No. 136 of 1910 arises, the land and the building are No. 105, College Street—both in the town of Calcutta. No objection appears to have been taken to the amount of compensation awarded by the Collector; but the two sums deposited in respect of these two houses were claimed by Srimati Trinayani Dasi, the present appellant, on the ground that she was entitled to these sums as executrix to the will of her late husband Nanda Lal Dey.

Nanda Lal Dey died leaving him surviving his widow Trinayani Dasi and a son Lal Gopal Dey. Lal Gopal Dey died in 1903, and in 1909 Trinayani Dasi applied for probate of a will which she propounded as the last will of her husband, Nanda Lal Dey. Probate was granted to her, it being held that, under the terms of the will, she was appointed executrix by implication. Under the will the testator made a *debutter* of all his immovable properties for the *sheba* of Iswar Sridharjiu Thakur, with the exception of a masonry building at No. 58, Nimu Khansama's Lane. He directed that his wife, Sreemati Trinayani Dasi, and his son, Lal Gopal Dey, should be the *shebaits* of this *debutter* property. He also directed that, out of the income of the *debutter* property, the *shebaits* would be entitled to a monthly allowance for their maintenance, and that the rest of the property was to be devoted to the worship of Iswar Sridhar Thakur.

Trinayani Dasi, having obtained probate of the will, put in two applications before the Special Land Acquisition Judge to withdraw the two sums of money which had been awarded as compensation for the two houses previously referred to. In each case she claimed to be entitled to the compensation money as the person who had the sole

right to the money. An objection in each case was put in on behalf of the sons of Lal Gopal Dey by their mother, who appeared in the suits to represent them. In that objection it was prayed that the money in deposit should be invested in Government securities, and that only the interest should be paid over to the *shebait*. The learned Judge allowed the objection, and passed an order under section 32 of the Land Acquisition Act to the effect that the money would be invested in Government promissory notes, and that the applicant, Trinayani Dasi, would be entitled only to draw the interest on those notes pending her obtaining some special order from the Probate Court entitling her to withdraw the money.

Two appeals against the orders of the lower Court in these two references have been preferred to this Court by Trinayani Dasi. Each of these appeals has been filed on a stamp of Rs. 10 only, and a preliminary objection has been taken to the hearing of these appeals on the ground that they are not properly stamped. The institution fee of Rs. 10 has been paid under article 17, clause vi of Schedule II of the Court-fees Act.

The learned pleader who appears for the respondent, and who has raised the preliminary objection, contends that the present cases cannot come under clause vi of article 17, *first*, because, in these cases it is possible to estimate at a money-value the subject-matters in dispute, and, *secondly*, because they are otherwise provided for by that Act.

Taking the second point first, the learned pleader contends that the present cases fall within the provisions of section 8 of the Court-fees Act, and that an *ad valorem* court-fee ought to have been paid on the memorandum of appeal in each case, computed according to the difference between the amount awarded and

1912

TRINAYANI DASI v. KRISHNA LAL DE.

the amount claimed by the appellant. The learned pleader for the appellant has argued that, in these cases, there was in fact no award at all, and that the provisions of section 8 cannot therefore be taken to apply. It seems, however, that these cases previously came before another Bench of this Court on a rule issued under section 115, Civil Procedure Code. The point was then considered whether or not an order under section 32 of the Land Acquisition Act was a part of an award made in a proceeding under the Act within the meaning of section 54, and this Court held that an order under section 32 was such a part of an award within the meaning of section 54, and that the proper remedy for the petitioner in that rule, who was the present appellant, was by an appeal and not by an application in revision. We see no reason to differ from the view which was taken by the learned Judges in that case, and we hold that, in the present cases, the order under section 32 of the Land Acquisition Act must be taken to be an award or part of an award made under the Act. The question whether an appeal lay in a case similar to the present and what was the correct stamp payable on the memorandum of appeal came up for consideration before a Bench of the Allahabad High Court in the case of *Sheo Rattan Rai* v. *Mohri* (1). That case was the converse of the present, and it was there held that an appeal lay against an order of the Land Acquisition Court refusing to pass an order under section 32 of the Land Acquisition Act, and that the court-fee payable would be an *ad valorem* fee. A similar view was taken by the High Court of Madras in the case of *Kasturi Chetty* v. *Deputy Collector, Bellary* (2). We are of opinion that the contention advanced by the learned pleader for the respondent is correct, and that the present

(1) (1899) I. L. R. 21 All. 354. (2) (1898) I. L. R. 21 Mad. 269.

cases clearly do not fall within the provisions of the second portion of clause vi of Article 17 of Schedule II of the Court-fees Act.

The learned pleader for the respondent has next contended that in the present appeals it is possible to estimate the relief claimed at a money-value. The petitioner claims to be entitled in her sole right to receive the full amount of the compensation in each case; but in each case the Judge of the Court below has held that she is not so entitled, and that she is a person who comes within the provisions of section 32 of the Act and is incompetent to alienate the property. The only relief which the learned Judge has allowed her in each case is to draw the interest on the money while her claims to receive the full amount of the compensation has been disallowed. The relief sought in each of the present appeals is certainly therefore a relief which can be estimated at a money-value. This is in accordance with the view which was taken by this Court in the case of *Bunwari Lal* v. *Daya Sunker Misser* (1), where it was held that to bring a case under the provisions of clause vi of Article 17, Section II of the Court-fees Act, it must be established that it was not possible even to state approximately a money-value for the subject-matter in dispute. In the present cases even supposing that the exact estimate cannot be given, it is, in our opinion, certainly possible to state approximately the money value of the relief claimed.

The learned pleader for the appellant has, however, contended that his client in the present cases is not a person coming within the provisions of section 32 of the Land Acquisition Act, because she made her claim in the Land Acquisition Court as an executrix and not as a *shebait*. We do not consider that there

(1) (1909) 13 C. W. N. 815.

1912

TRINAYANI DASI v. KRISHNA LAL DE.

is much force in this contention; for, section 90 of the Probate and Administration Act on which the learned pleader is inclined to place reliance in sub-section (*2*), distinctly provides that the power of an executor to dispose of immoveable property is subject to any restriction which may be imposed in this behalf by the will appointing him. The will under which the present appellant claims as executrix has been read to us, and we are of opinion that there can be no doubt that she has not as an executrix or a *shebait* any power to alienate the property. We are of opinion, therefore, that the preliminary objection taken to the hearing of the present appeals must be allowed, and that before the appeals can be heard, proper court-fees must be paid. We hold that, in our opinion, the court-fee payable on the memorandum of appeal in each case is that provided for in section 8 of the Court-fees Act, and we direct that, the two cases be referred to the Taxing Officer in order that he may determine the court-fee payable on each appeal; and, if the deficit court-fee be deposited within a fortnight from the date of the decision of the Taxing Officer, the appeals be brought up again before us for disposal. Otherwise, the appeals will stand dismissed with costs.

[The court-fees determined by the Taxing Officer not having been paid within the time allowed, the appeals were dismissed.]

S. C. G.

PRIVY COUNCIL.

JADU LAL SAHU

v.

JANKI KOER.

*P.C.** 1912

Feb. 1, 2 ; *March* 20.

[ON APPEAL FROM THE HIGH COURT AT FORT WILLIAM IN BENGAL.]

Mahomedan law—Pre-emption—Customary right—Hindus in Bihar—Right of pre-emption—Co-sharers—Assertion of right of pre-emption, delay in making—Power to perform ceremonies of assertion—Manager appointed by Court of Wards of estate of "disqualified proprietor" under the Court of Wards Act (Ben. Act IX of 1879)—Power and duties of manager under section 40 of Act—Basis of right of pre-emption among co-sharers in undivided mahal—Sanction of Court of Wards.

THE Mahomedan law of pre-emption has long been judicially recognised as existing among the Hindus in Bihar, to which the district of Champaran appertains.

Fakir Rawot v. *Emambaksh* (1) followed.

In a suit for pre-emption in respect of certain undivided shares in a number of villages comprised in a mahal, the estate of the plaintiff was in charge of the Court of Wards as that of a "disqualified proprietor" under Bengal Act IX of 1879, section 40 of which provides that the manager "shall manage the property . . . . . diligently and faithfully for the benefit of the proprietor, and shall in every case act to the best of his judgment for the ward's interest, as if the property were his own :—

Held, that the manager appointed by the Court of Wards was, independently of the provisions of section 40 of the Court of Wards Act, competent, on behalf of the plaintiff, to perform the preliminaries essential to the assertion of the right to pre-emption : though if, in that case, the validity of his action depended on the sanction of the Court of Wards, their Lordships were of opinion that section 40 gave him full authority to act as he had done ; and in that view the adoption of his acts by the Court of Wards became unnecessary.

* *Present :* LORD SHAW, LORD ROBSON, SIR JOHN EDGE AND MR. AMEER ALI.

(1) (1863) B. L. R. Sup. Vol. 35 ; W. R. F. B. 143.

1912

JADU LAL SAHU v. JANKI KOER

A "mahal" is a unit of property, and though all the villages of which it consists may be separately assessed for revenue purposes, and each of the sharers may not have an interest in them all, the sharers are all co-sharers in the whole mahal, and jointly liable for the Government revenue. Each co-sharer, therefore, has a right of pre-emption against the others in respect of any part of the mahal sold by any of them to a stranger. After partition by the Revenue authorities, each share so partitioned becomes a unit of property.

APPEAL from a judgment and decree (31st January 1908) of the High Court at Calcutta, which affirmed a judgment and decree (17th September 1906) of the Second Subordinate Judge of Muzaffarpur.

The contesting defendants (2 to 11) were the appellants to His Majesty in Council.

The suit giving rise to this appeal was brought by the first respondent, Maharani Janki Koer, to enforce the right of pre-emption in respect of certain property which had been sold by one Barkatunnissa (the first defendant, now the second respondent) a Mahomedan, to the appellants (defendants 2 to 11), who were Hindus. The plaintiff was the widow of the late Maharajah of Bettiah, whose estate was after his death placed in charge of the Court of Wards under Bengal Act IX of 1879. She sued by her next friend Mr. J. R. Lowis, the Manager of the estate under the Court of Wards. The property in respect of which it was sought to enforce pre-emption was situate in the Champaran district in Behar, in which the plaintiff, the vendor, the defendant Barkatunnissa, and the remaining defendants (12 to 25, respondents 3 to 16) were co-sharers. The defendants-respondents last named were joined as *pro formâ* defendants, no relief being sought against them.

The property in suit was the share of Barkatunnissa in mahal Motihari which she had sold to the appellants by a deed dated 28th July 1904, they previously having no proprietary interest in the mahal.

1912

JADU LAL SAHU v. JANKI KOER.

Mahal Motihari consisted of 31 villages. The plaintiff Janki Koer had shares in 18 out of these 31 villages. The defendant Barkatunnissa, the vendor, had shares in 24 villages out of the 31, but the plaintiff had shares in only 16 out of those 24 villages. In the assessment of the mahal the revenne derivable from each village was separately stated; but the mahal formed a single estate in the Collectorate rent-roll, and the whole mahal was liable to sale for arrears due from any of the proprietors.

The Subordinate Judge decided in favour of the plaintiff, and his decree was affirmed on appeal to the High Court.

The facts are sufficiently stated in the report of the case on the appeal to the High Court (BRETT and COXE JJ.) which will be found in I. L. R. 35 Calc. 575, and also in the judgment of Mr. Justice Brett at page 583 of the same volume.

On this appeal,

Kenworthy Brown, for the appellants, contended that the plaintiff-respondent had no right, of pre-emption by reason of any custom or territorial law existing amongst Hindus in Champaran, and if she relied on the rule of pre-emption, it was for her to prove that such a law or custom prevailed; there was no evidence of it, and the Courts below had erred in taking judicial notice of the Mahomedan law of pre-emption amongst Hindus in Bihar. Reference was made to Sir R. Wilson's Mahomedan Law, 376, 378: *Fakir Rawot* v. *Emambaksh* (1), and *Kantiram* v. *Woli Sahu* (2). Even if it were in force in Champaran as a rule "of justice, equity and good conscience," it was submitted that the plaintiff was not entitled to enforce it

(1) (1863) B. L. R. Sup. Vol. 35, 47. W. R. F. B. 143.

(2) (1869) 2 B. L. R. 330; 11 W. R. 251.

1912

JADU LAL SAHU v. JANKI KOER.

under the circumstances of the present case. Proceedings for partition had been taken under the Estates Partition Act (V of 1897), and the order made under section 29 of that Act, had extinguished any right of pre-emption by destroying the relation of co-sharers which might previously have existed between the parties. If partition had taken place, the rule of pre-emption was inapplicable, for the object of pre-emption was to keep the property of the co-sharers together. The plaintiff had also lost her right of pre-emption by the purchase of a portion of the property in February 1905. The plaintiff, moreover, was not entitled to any right of pre-emption in respect of shares in villages sold by the vendor (the first defendant) in which the plaintiff herself had no interest, because in regard to those villages the plaintiff could not be considered to be a co-sharer with the first defendant. In the assessment too the revenue derivable from each village in the mahal was stated separately for revenue purposes; and the fact that the co-sharers were all jointly liable for the revenue was not sufficient for the basis of a right of pre-emption: *Joobraj Singh* v. *Tookun Singh* (1) was referred to. But if the right of pre-emption did exist, the rules and ceremonies of Mahomedan law should have been strictly observed, and it was contended that they had not been so observed. There was delay in performing the *talab-i-mawasibat*, after the plaintiff (through Mr. Lowes, the Manager of the plaintiff's estate under the Court of Wards) became aware of the sale; the circumstances in fact showing that he had been given the option of purchasing the property, and had refused to do so: *Nundo Pershad Thakur* v. *Gopal Thakur* (2). The ceremony of immediate demand for pre-emption was not made by the plaintiff respondent personally, and

(1) (1870) 14 W. R. 476. (2) (1884) I. L. R. 10 Calc. 1008, 1012.

Mr. Lowis was not authorised to perform the essential ceremonies for a claim to pre-emption under the Mahomedan law. As to the power of the manager of an estate, reference was made to *Mir Sarwarjan* v. *Fakhruddin Mahomed Chowdhuri* (1); the Court of Wards Act (Ben. Act IX of 1879), sections 12, 14, 18, 39, 40, 41, 48, 49, 50 and 80; and *Wajid Ali Khan* v. *Hanuman Prasad* (2). The manager was not specially empowered or authorised to act in the matter, and no sanction of the Board of Revenue or the Court of Wards was obtained. There was no ratification which to be effective must be made at once: *Dibbins* v. *Dibbins* (3), *Bird* v. *Brown* (4), *Lyell* v. *Kennedy* (5) and *Bolton Partners* v. *Lambert* (6); which last mentioned case, though followed in *In re Portuguese Copper Mines, Limited, Ex parte Badman* (7), is said by the author of Fry's Specific Performance (5th Ed.), note A, page 781, to be of doubtful authority and needing reconsideration. If an act is done without power to do it, no ratification can make it valid. Ratification of an unauthorised act cannot be allowed to affect third persons: Cunningham and Shepherd's edition of the Contract Act (IX of 1872), section 200, was referred to.

De Gruyther, K.C., and *E. U. Eddis*, for the first respondent (who were called upon only on the question of the right of pre-emption between co-sharers with regard to their liability to pay revenue to Government), referred to Sir R. Wilson's Mahomedan Law, page 396, sections 377, 378; Hamilton's Hedaya, 548, Book XXXVIII "Right of Shaffa" Chapter I.

(1) (1911) I. L. R. 39 Calc. 232; L. R. 39 I. A. 1.
(2) (1869) 4 B. L. R. (A.C.) 139; 12 W. R. 484.
(3) [1896] 2 Ch. 348.
(4) (1850) 4 Exch. 786, 798; 19 L. J. Exch. 154, 158.
(5) (1889) L. R. 14 A. C. 437.
(6) (1889) L. R. 41 Ch. D. 295, 307.
(7) (1890) L. R. 45 Ch. D. 16.

1912

JADU LAL SAHU v. JANKI KOER.

All the persons whose lands were within the boundaries of a mahal were co-sharers; both the plaintiff-respondent and the first defendant were therefore co-sharers in the whole of mahal Motihari, and had a right of pre-emption on the sale of any of the land in the mahal by any of the co-sharers to a stranger: see the judgment of BRETT J. at page 586 of I. L. R. 35 Calc. The right of pre-emption was not extinguished until a formal division had been taken defining the share of each co-sharer. Reference was made to *Mahadeo Singh* v. *Zitannissa* (1); *Wajid Ali Khan* v. *Hanuman Pershad* (2); *Joobraj Singh* v. *Tookun Singh* (3); and *Munna Lal* v. *Hajira Jan* (4). [MR. AMEER ALI referred to *Mahomed Hossein* v. *Mohsin Ali* (5)].

Kenworthy Brown replied.

The judgment of their Lordships was delivered by

March 20.

MR. AMEER ALI. The suit out of which this appeal arises was brought by the plaintiff-respondent to establish her right of pre-emption in respect of certain undivided shares in a number of villages comprised in mahal Motihari, situated in the district of Champaran.

The shares in question belonged to a Mahomedan lady named Barkatunnissa, the first defendant to this action, who sold the same to the Sahu defendants by a deed of sale dated the 28th of July 1904. Barkatunnissa owned an interest in 24 out of the 31 villages comprised in the mahal, whilst the plaintiff possesses shares in 18. The vendors had admittedly no proprietary interest in mahal Motihari prior to their purchase from Barkatunnissa.

(1) (1869) 7 B. L. R. 45 note; 11 W. R. 169.
(2) (1869) 4 B. L. R. 139; 12 W. R. 484.
(3) (1870) 14 W. R. 476.
(4) (1910) I. L. R. 33 All. 28.
(5) (1870) 6 B. L. R. 41; 14 W. R. F. B. 1.

The plaintiff claims that as a co-sharer in the mahal she is entitled to the right of pre-emption in respect of the shares sold to the Sahus by the first defendant.

Champaran appears to have been part of the Civil Division of Saran until some time after the institution of the suit. The action was accordingly brought in the Court of the Subordinate Judge of Saran, but owing to the subsequent amalgamation of Champaran with Tirhoot, it was tried before the Subordinate Judge of Muzufferpur (the Suddar station of Tirhoot) who decreed the plaintiff's claim. This decree has been affirmed by the High Court of Bengal.

It has been urged on behalf of the appellants that as the right claimed is a creation of the Mussulman law, and it is not proved that the Mussulman law of pre-emption is in force among the Hindus of the district of Champaran, both the pre-emptor and the vendees being Hindus, the action must fail.

The suit was instituted on the 7th of March 1905, the Sahu defendants filed their defence on the 16th of June, and issues for trial were settled on the 27th of September 1905. It was not, however, until the 11th of July 1906, when as the learned Judges of the High Court observe, "the suit was ripe for hearing," that the Sahu defendants for the first time raised a question as to the existence of the right of pre-emption among the Hindus of Champaran. Both the Courts in India have, in their Lordships' judgment, rightly overruled the defendants' objection.

The law of pre-emption, under which the plaintiff claims the right, was introduced into India with the Mahomedan Government. The Province of Bihar, to which the District of Champaran appertains, was an integral part of the Mahomedan Empire, and consequently it would not be surprising to find that in

1912

JADU LAL SAHU v. JANKI KOER.

Bihar the right of pre-emption is enforcible irrespective of the persuasion of the parties concerned.

In the case of *Fakir Rawot* v. *Emambaksh* (1), Full Bench of the High Court of Bengal gave judicial recognition to the existence of the right of pre-emption among the Hindus of Bihar. In delivering the judgment the Chief Justice (Sir Barnes Peacock) reviewed the earlier cases bearing on the subject, and held that:—

". . . . a right or custom of pre-emption is recognised as prevailing among Hindus in Bihar and some other provinces of Western India; that in districts where its existence has not been judicially noticed, the custom will be matter to be proved; that such custom, when it exists, must be presumed to be founded on and co-extensive with the Mahomedan law upon that subject, unless the contrary be shown; that the Court may, as between Hindus, administer a modification of that law as to the circumstances under which the right may be claimed, when it is shown that the custom in that respect does not go the whole length of the Mahomedan law of pre-emption, but that the assertion of the right by suit must always be preceded by an observance of the preliminary forms prescribed in the Mahomedan law, which forms appear to have been invariably observed and insisted on through the whole of the cases from the earliest times of which we have record."

In their Lordships' judgment the decision in *Fakir Rawot's Case* (1) is conclusive on the point raised on behalf of the defendants. Their abstention from taking the objection in a definite and distinct form at the earliest stage of the case was, it may fairly be presumed, due to the explicit enunciation of the law in the ruling referred to.

It has also been contended that the formalities insisted upon by the Mussulman law as essential preliminaries to the assertion of the right, could not be performed by the manager of the plaintiff's estate appointed by the Court of Wards.

It appears that the plaintiff is a "disqualified proprietor" under the Court of Wards Act (Bengal

(1) (1863) B. L. R. Sup. Vol. 35.

Act IX of 1879), having been declared to be incompetent to manage her property, and her estate is in the charge of the Court of Wards. Section 40 of the Act which defines the general duty of managers appointed by the Court of Wards provides that he "shall manage the property committed to him diligently and faithfully for the benefit of the proprietor, and shall in every respect act to the best of his judgment for the ward's interest as if the property were his own."

The Mussulman law insists that the first formality technically called "the immediate demand" should be observed by the pre-emptor or some one on his behalf immediately on receipt of the news of the sale, otherwise the right of pre-emption falls to the ground. The second formality consists in the repetition of the "demand" with as little delay as possible under the circumstances, in the presence of witnesses either before the vendor or the vendee or on the premises. The Courts in India have found that the ceremonies were duly performed by the manager in accordance with the prescriptions of the law. Had he failed in performing either of the ceremonies, he would have caused irreparable loss to the plaintiff, as her right would have been absolutely defeated by his laches. In their Lordships' opinion Mr. Lowis, as manager of the plaintiff's estate, was competent, independently of the provisions of section 40 of the Court of Wards Act, to observe the formalities on her behalf. The section, however, which defines his duties appears to their Lordships to fully clothe him with authority to act as he did; the validity of his action, therefore, did not depend on its subsequent adoption by the Court of Wards. In this view the English cases cited at the Bar have no application to the present case.

It was also urged that the claim to co-parcenary, on which the plaintiff's right of pre-emption was based,

1912

JADU LAL SAHU v. JANKI KOER.

arose out of the fact that the vendor and pre-emptor were jointly liable for the payment of the Government revenue assessed on the villages comprised in the mahal, and that this joint liability does not constitute the co-parcenary contemplated by the Mahomedan law. This argument seems to proceed on a misconception of the land system of India. A mahal is a unit of property; it may consist of one village or of several villages: it may be owned by one or several proprietors who may have an interest in all or some of the villages comprised in the estate. Their joint liability for the Government revenue arises from the fact that they own undivided interests in the property; and that joint liability does not cease in the case of any co-sharer until his particular share has been partitioned by the Revenue authorities, when the share so partitioned becomes a separate unit of property.

On the whole their Lordships are of opinion that the decree of the High Court should be affirmed, and this appeal dismissed with costs, and they will humbly advise His Majesty accordingly.

Appeal dismissed.

Solicitors for the appellants: *T. L. Wilson & Co.*

Solicitors for the first respondent: *Sanderson, Adkin, Lee & Eddis.*

J. V. W.

LETTERS PATENT APPEAL.

Before Sir Lawrence H. Jenkins, K.C.I.E., Chief Justice, and Mr. Justice N. R. Chatterjea.

KAILASH CHANDRA BOSE

v.

GIRIJA SUNDARI DEBI.*

1912

March 28.

Mortgage—Decree in foreclosure—Suit against legal personal representative of widow—Res judicata—Suit for redemption by the widow's reversionary heir—Effect of decree on appeal on original decree—Decree of Appellate Court, what it exactly should be—Civil Procedure Code (XIV of 1882), ss. 551, 577, 586

Decree in a foreclosure suit which was instituted against the mortgagor, who was a widow, and which was wrongly continued in appeal by the legal personal representative of the widow, and in which the reversioner was no party, is no bar to a suit for redemption by the reversionary heir.

Where there is a decree on appeal which confirms the decree against which the appeal is made, it is the appellate decree to which regard must be had. The appellate decree supersedes the original decree.

Noor Ali Chowdhury v. *Koni Meah* (1) followed.

Semble: The expression of law contained in section 577 of the Code of Civil Procedure of 1882 as regards the proper course to be adopted in appellate decrees, viz., that except when an appeal is incompetent as being out of time, or as coming within the provisions of section 586, an appeal is not to be dismissed, but the judgment is to confirm, vary or reverse the decree against which the appeal is made, is still applicable.

SECOND APPEAL by the plaintiff.

This appeal arose out of a suit brought by the plaintiff for a redemption of a mortgage by way of conditional sale after taking accounts from the mortgagee defendant No. 1 of the receipts by her from the

* Letters Patent Appeal, No. 78 of 1911, in special Appeal No. 465 of 1909.

(1) (1886) I. L. R. 13 Calc. 13.

1912

KAILASH CHANDRA BOSE v. GIRIJA SUNDARI DEBI.

mortgaged property by way of profit during the period of her possession of the same from Asarh 1291 B. S., and setting off the amount of the said profit against the mortgage debt and then on payment by him of the balance of the debt, if any, within a time to be given to him. The property thus mortgaged originally belonged to one Gangamohan Bose and the mortgage was given by his widow. The plaintiff's case was that, on the death of the mortgagor, the property devolved upon her husband's step-brother as his sole reversionary heir, and then, on the death of the latter, he, the plaintiff, as his son, inherited it from him, and thus became entitled to redeem the mortgage. After this mortgage, there were two suits in connection with it, the one by the mortgagee defendant No. 1 after service of notice of foreclosure under Regulation XVII of 1806 against the mortgagor for recovery of possession of the property, and it resulted in a decree in favour of the said mortgagee and he then entered into possession of it in Asarh 1291 B. S., and the other by the plaintiff himself for recovery possession of the property from the mortgagee on the ground that the mortgage was fraudulent and collusive, and that there was, moreover, no legal necessity to validate the mortgage against him and it was dismissed, the mortgage having been found to have been true and valid and also binding upon the reversionary heir on account of the legal necessity that subsisted for the same. The mortgagee defendant No. 1, as also the subsequently added defendant No. 2, who had a mortgage-decree against the defendant No. 1, contested the suit. Their contentions, *inter alia*, were that as the mortgage was for legal necessity, the decree obtained by the defendant No. 1, mortgagee, was binding upon the plaintiff, and that the right of redemption set up by him was lost to him, and that section 43 of the Civil Procedure

Code (of 1882) also barred his claim for ever. The Court of first instance disallowed all the objections of the defendants and decreed the suit in favour of the plaintiff as prayed for by him. The defendant No. 1, mortgagee, preferred an appeal. The defendant No. 2, as a respondent in that appeal, also preferred a cross-appeal taking exception to the Court's order in the matter of costs as affecting the company. The appeal and cross-appeal were dismissed. Thereupon, defendant No. 1 preferred a second appeal to the High Court; and this appeal was heard by Coxe J., sitting singly. His Lordship decreed the appeal and dismissed the suit. Hence this Letters Patent Appeal.

Babu Nilmadhab Bose and *Babu Shib Chandra Palit*, for the appellant,

Babu Surendra Chandra Sen, for the respondent.

JENKINS C.J. The circumstances of this case are peculiar: one Ganga Mohan Bose died, and on his death his widow Bindubasini succeeded to a widow's interest in his estate. In 1877 she executed a mortgage in favour of defendant No. 1. Subsequently, the mortgagee took action under section 7 of Regulation XVII of 1806, and notwithstanding the argument that has been addressed to us, I see no reason to hold that there was any irregularity in those proceedings. As a sequel the mortgagee instituted a suit which resulted in a decree for foreclosure against the widow Bindubasini in 1882. The widow preferred an appeal, but while the appeal was pending she died, and the appeal was continued not by Ganga Mohan's reversionary heir, but by the widow's legal personal representative, her daughter, and a decree was passed on appeal on the 23rd of June 1882 affirming that of the first Court. In 1884, the mortgagee obtained possession. A suit was instituted in 1886 by the present plaintiff

1912

KAILASH CHANDRA BOSE v. GIRIJA SUNDARI DEBI.

JENKINS C.J.

against the mortgagee, impugning the mortgage as fraudulent and not for legal necessity, and therefore as being of no legal effect against him. That suit resulted in a dismissal which was affirmed by the lower Appellate Court and also by the High Court. It was determined in the lower Appellate Court that the foreclosure decree in the former suit did not operate as a bar against the plaintiff, and the High Court in dealing with the matter said that it passed no opinion as to any right that the appellant might have to redeem. The plaintiff has now brought this present suit for redemption making as defendant the original mortgagee who is still alive and a limited company who does not contest the plaintiff's claim. Both the Court of first instance and lower Appellate Court decided in the plaintiff's favour. Mr. Justice Coxe, sitting as a single Judge, has decided adversely to him and dismissed the suit. From his judgment the present appeal is preferred.

The only question that arises on this appeal is whether the result of the first of the suits that I have mentioned, the foreclosure suit, is a bar to the plaintiff's claim. I have stated that the appeal in that suit was continued not by the reversionary heir on whom the estate devolved at the death of the widow, but by the widow's daughter, and she did not in any sense represent the estate of Ganga Mohan Bose and had no interest in that estate. On the other hand, the present plaintiff's father, the reversionary heir, was a person on whom it had devolved. He applied to be allowed to continue the appeal, but his attempt failed for a reason which was admittedly erroneous. The case was not treated as coming within the operation of section 367 of the Code of Civil Procedure of 1877, and we are free from any difficulty that section might create. The plaintiffs on whom admittedly (apart

from foreclosure) the equity of redemption would have devolved, and in whom it would now be vested, would, *primâ facie*, be entitled to redeem. And so the question arises whether he has been deprived of that right by the decree in the foreclosure suit. The decree in that suit was in the Court of first instance against the widow, and it may be that this decree, had there been no appeal, would have been binding as against the reversioner, even though the mortgage was created by the lady herself. That is a point on which I express no opinion at this stage, because I do not think it is necessary, and I reserve my opinion until occasion arises for its decision. But whatever may have been the effect of that decree, had it stood by itself, it was superseded by the decree passed on appeal. The decree of the Court of first instance could not in the circumstances be pleaded as *res judicata*, and the effect of a decree on appeal was indicated in *Noor Ali Chowdhuri* v. *Koni Meah* (1), which professes to follow earlier decision. It is there pointed out that where there is a decree on appeal which confirms the decree against which the appeal is made, it is the appellate decree to which regard must be had, and the appellate decree supersedes the original decree. I would pause here for a moment to draw attention to a possible source of error in decrees of Appellate Courts by reason of failure to observe the provisions of the Code, and in this connection I will refer to the Code of 1882, which contains an expression of the law that is still applicable. By section 551 it is provided that in the circumstances there indicated the Court may dismiss the appeal. But where the case goes to a hearing, then the powers of the Court are defined in section 577 which provides not that the appeal is to be dismissed, but that "the

(1) (1886) I. L. R. 13 Calc. 13.

1912

KAILASH CHANDRA BOSE v. GIRIJA SUNDARI DEBI.

JENKINS C.J.

judgment may be for confirming, varying or reversing the decree against which the appeal is made." It may be that when the appeal is incompetent as being out of time or as coming within the provisions of section 586, the proper course will be to dismiss it. Apart from that, it seems to me that ordinarily the proper course is, as provided in the section, to confirm, vary or reverse the decree against which the appeal is made. But to return to the facts of this case, what is the answer to the right to redeem vested in the present plaintiff? It is said the decree in the foreclosure suit is a bar. But that must be the decree in appeal, and to that decree the present plaintiff was not a party, nor was there any one with any interest in the estate who was a party to the litigation at that stage. The person against whom that decree was passed was one who did not represent the estate but represented only the widow's personal interest. Therefore, the decree on appeal cannot afford an answer to the plaintiff's claim to redeem. Admittedly, if the suit had been commenced against the widow's representative, it would have been insufficient, and it seems to me that it is equally insufficient when the only effective decree is one passed against a defendant who did not represent the estate. I, therefore, think the judgment of Mr. Justice Coxe must be set aside, and the decree of the lower Appellate Court restored.

The costs in the High Court must be borne by the respondent, the original mortgagee.

N. R. CHATTERJEA J. I agree.

S. M. *Appeal allowed.*

CRIMINAL REVISION.

Before Mr. Justice Holmwood and Mr. Justice Imam.

JABBAR SHAIK

v.

TAMIZ SHAIK.*

1912

April 12.

Criminal Procedure Code (Act V of 1898), s. 263—Hearing and recording of evidence—Complainant and his witnesses, examination of—Procedure—Practice.

Section 263 of the Criminal Procedure Code does not excuse the Magistrate from hearing the evidence of all witnesses. In all criminal cases the complainant and such witnesses as he may produce must be examined, whether their evidence is required to be recorded or not, and the case must be decided upon the effect of their evidence.

THE facts are shortly these : The complainant on the 10th of November 1911 lodged an information that the accused had cut and destroyed his unripe paddy from his land. A police investigation was held and the accused was sent up before the Subdivisional Officer of Tangail, under sections 143 and 447 of the Indian Penal Code. The learned Subdivisional Officer examined the complainant, held a local investigation, but refused to examine the complainant's witnesses who were in attendance in Court. By his order, dated the 4th of January 1912, he acquitted the accused under section 245 of the Criminal Procedure Code. Against this order the High Court issued a Rule.

Babu Atulya Charan Bose, in support of the Rule, contended that under section 263 of the Criminal Procedure Code the Magistrate was excused from recording evidence, but under section 244 he was *not*

* Criminal Revision No. 316 of 1912, against the order of P. H. Waddell, Subdivisional Magistrate of Tangail, dated Jan. 4, 1912.

1912

JABBAR SHAIK v. TAMIZ SHAIK.

excused from taking all such evidence as may be produced in support of the prosecution.

No one appeared to shew cause.

HOLMWOOD AND IMAM JJ. This Rule must be made absolute on the ground on which it was issued. We are surprised to find that the learned Subdivisional Officer should so misapprehend the provision of the law under section 263, Criminal Procedure Code. That section does not excuse the Magistrate from hearing the evidence of all witnesses. It excuses him from recording the evidence of any of the witnesses. But it is an elementary point that recording evidence is not the same as hearing evidence. In all criminal cases if the accused denies the charge, the complainant and such witnesses as he may produce must be examined, and the case must be decided upon the effect of their evidence. The order of acquittal is, therefore, clearly without jurisdiction having been made without evidence having been heard.

The order of the lower Court is set aside, and there will be a re-trial before any Magistrate the District Magistrate may direct.

S. K. B. *Order of acquittal set aside.*

ORIGINAL CIVIL.

Before Mr. Justice Chaudhuri.

KAMINI DASEE

v.

KRISHNA CHANDRA MUKERJEE.*

1912

April 23.

Gift—Purdanashin donor—Fiduciary relationship—Cancellation—Independent and competent advice—Duty of Solicitor—Power of revocation—Transfer of Property Act (IV of 1882), s. 126—Costs.

Where an old illiterate *purdanashin* woman executes an improvident deed of gift in favour of a person standing towards her in a fiduciary capacity, the *onus* lies on the donee to establish not only that the donor understood the transaction, but that she was in a position to exercise a free and unfettered judgment, that the intention to give was her own voluntary act, and that she had independent and competent advice.

Huguenin v. *Baseley* (1), *Hall* v. *Hall* (2), followed.

Kanai Lal Jowhari v. *Kamini Debi* (3), *Lyon* v. *Home* (4) referred to.

It is the duty of a solicitor, who acts as the sole solicitor in such a transaction, to try and protect the lady against herself, and to make all proper enquiries. A solicitor does not discharge his duty by satisfying himself simply that the donor understands and wishes to carry out the particular transaction. He must also satisfy himself that the gift is one that it is right and proper for the donor to make under all the circumstances ; and if he is not so satisfied, it is his duty to advise his client not to go on with the transaction, and to refuse to act further if the client persists.

Powell v. *Powell* (5), *Wright* v. *Carter* (6), followed.

Coomber v. *Coomber* (7) distinguished.

* Original Civil Suit No. 639 of 1910.

(1) (1807) 14 Ves. 273.
(2) (1873) L. R. 8 Ch. App. 430.
(3) (1867) 1 B. L. R. 31 (note).
(4) (1868) L. R. 6 Eq. 655.
(5) [1900] 1 Ch. 243.
(6) [1903] 1 Ch. 27.
(7) [1911] 1 Ch. 273.

1912

KAMINI DASEE v. KRISHNA CHANDRA MUKERJEE.

In considering the validity of a deed of gift, the absence of a power of revocation is of importance, though not sufficient by itself to shew that the gift is invalid.

Hall v. *Hall* (1) referred to.

ORIGINAL SUIT.

This suit was brought by the plaintiff Sreemutty Kamini Dasee, an illiterate Hindu *purdanashin* lady, to set aside a voluntary deed of gift executed by her in respect of certain immoveable property in favour of the defendant, Krishna Chandra Mukerjee. The property, No. 13 Mullunga Lane, in Calcutta, was the plaintiff's *stridhan* property and was valued by her at about Rs. 7,000. She had very little other property besides this house.

The defendant was the son of Girish Chandra Mukerjee, who had been the priest of Durga Churn Soor, plaintiff's husband, and after Girish Chunder's death the defendant had been acting as plaintiff's priest.

For a considerable number of years the plaintiff lived at No. 13 Mullunga Lane with her husband and her mother. Her husband died in June 1906, leaving no children but some nephews. The plaintiff's mother continued living with her till her death on the 15th April 1908. The plaintiff was then about sixty years of age, and was much affected by her recent family bereavements.

On the 15th July 1908 the plaintiff executed in favour of the defendant the deed of gift, the subject of the present suit. The indenture described the defendant as a Brahmin priest, and recited that the plaintiff and her late husband had all along borne him great love and affection and had taken him as their *vikshaputra*, and treated him as their own son, and that after her husband's death the plaintiff had been

(1) (1873) L. R. 8 Ch. App. 430.

cared for and looked after by the defendant: the gift purported to be made out of love and affection. The instrument was executed by the plaintiff in the presence of Dwijendra Mohan Ghosh, solicitor, Ashutosh Bonnerjee, Khetter Mohan Bhattacharjee and Dino Nath Hazrah, and was registered on the 17th July 1908. The document was in the English language.

This suit was instituted on the 1st July 1910. The plaintiff alleged that she was an old, weak and illiterate *purdanashin* widow and was unable to transact business, that the defendant had acquired great influence over her in the course of his religious attendance, and had persuaded her that it would be for her spiritual benefit to dispose of her dwelling-house in his favour by will, and that taking advantage of her old, deaf and infirm condition and in violation of the trust and confidence imposed in him by her, the defendant induced the plaintiff to execute the instrument in suit, which she believed to be a will, but which she had since ascertained was a deed of gift. The plaintiff complained that she had been dominated by the defendant and had had no competent independent advice, and that she never understood the import and effect of the instrument.

Subsequent to the execution of the deed, the plaintiff continued living on the premises, and paying Government revenue and municipal taxes in respect thereof.

The defendant alleged that the plaintiff was quite capable of transacting business, that she thoroughly understood the purport of the indenture which had been fully explained to her, that she had not been influenced by himself, but had had independent advice, and had executed the deed of gift out of love and affection for him. The defend nt further alleged that as he had been on the best of terms

1912

KAMINI DASEE v. KRISHNA CHANDRA MUKERJEE.

with the plaintiff he had permitted her to remain in occupation of the premises subsequent to the execution of the deed of gift.

At the trial it was conceded by the defendant that there was a fiduciary relationship between himself and plaintiff, and that the *onus* lay upon him to shew the entire *bonâ fides* of the transaction. It was the defendant's case, that after her mother's death, the plaintiff desired to make a gift of the property to him for the double purpose of preventing her husband's nephews from touching the property and because she considered it a meritorious act. On being spoken to by the plaintiff on the subject, the defendant referred her to Khettra Mohan Bhattacharjee, a friend of the family, who was a teacher of the defendant, and had acted as the plaintiff's priest.

Khettra Mohan deposed, that on being consulted by the plaintiff, he pointed out to her that she had not very much to live upon, and if she made over the property to the defendant, he might turn her out, but that she insisted upon making the gift, and that thereupon on or about the 1st July 1908 he gave instructions to the solicitor, Dwijendra Mohan Ghose.

The attorney deposed that he read over the draft deed and explained it to the plaintiff, that he explained the deed to her again at the time of the execution, and that he told her that by making the gift she would "no longer have any interest in the property," but that it would become the defendant's.

Dwijendra Mohan Ghose was the only solicitor employed in the transaction, and apparently acted for both parties. It appears that he did not enquire of the donor what her means were, whether the donee had exercised any influence over her, or what had led her to make the gift, nor does it appear he had sufficient knowledge of the circumstances to enable

him to advise the donor as to the expediency or otherwise of the gift.

Although denied by the plaintiff at the trial, it was established in evidence that she was informed and knew what was the nature and effect of the instrument.

Mr. Pugh (with him *Mr. S. P. Roy* and *Mr. J. C. Bagchi*), for the plaintiff. The gift was a highly improvident one, consisting of practically the whole of the donor's property. The donor was an old friendless, illiterate *purdanashin* lady. The Courts in India always regard a *purdanashin* lady as requiring special protection: *Bibee Rukhum* v. *Shaikh Ahmed Hossein* (1). The fiduciary position of the defendant is admitted. The defendant has not discharged his *onus*. To uphold the gift, the donee must establish that it was the free, deliberate, voluntary act of the donor, after competent independent advice: *Huguenin* v. *Baseley* (2), *Allcard* v. *Skinner* (3), *Hall* v. *Hall* (4), *Kanai Lal Jowhari* v. *Kamini Debi* (5), *Mannu Singh* v. *Umadat Pande* (6), *Wajid Khan* v. *Ewaz Ali Khan* (7). The plaintiff's case is that she understood the instrument to be a will. Even if the Court held otherwise it would not deprive her of relief: *Lyon* v. *Home* (8). It is not enough that the donor should have been informed of and understood the consequences of executing the deed; it is essential that she should have had competent, independent advice. It cannot be said that the solicitor in the transaction was in a position to give her such advice. By acting as the solicitor of both parties, he had placed himself in a

(1) (1874) 22 W. R. 443.
(2) (1807) 14 Ves. 273.
(3) (1887) L. R. 36 Ch. D. 145.
(4) (1873) L. R. 8 Ch. App. 430.
(5) (1867) I. B. L. R. 31 (note).
(6) (1890) I. L. R. 12 All. 523.
(7) (1891) I. L. R. 18 Calc. 545.
(8) (1868) L. R. 6 Eq. 655.

1912

KAMINI DASEE v. KRISHNA CHANDRA MUKERJEE.

false and difficult position: *Powell* v. *Powell* (1). In the words of Farwell J. in the last mentioned case "the solicitor does not discharge his duty by satisfying himself simply that the donor understands and wishes to carry out the particular transaction. He must also satisfy himself that the gift is one that it is right and proper for the donor to make under all the circumstances: and if he is not so satisfied, his duty is to advise his client not to go on with the transaction, and to refuse to act further for him if he persists:" see also *Wright* v. *Carter* (2). The attorney made no sufficient enquiry and did not warn the donor as to the improvidence of the course she was taking. The absence of any power of revocation in the deed shows that the donor did not understand the purport of the instrument, thus rendering it invalid: *Hall* v. *Hall* (3), May on Fraudulent and Voluntary Dispositions of Property, 3rd edition, p. 436.

Mr. Sircar (with him *Mr. C. C. Ghose*), for the defendant. The donor was not illiterate, but could read and write well and kept accounts. The gift was a voluntary one and made out of natural love and affection. The instrument was explained to her by the solicitor and she fully understood the contents and purport. Her evidence on the point was false. The gift was a free, voluntary act of the donor with full knowledge. The donor had competent and independent advice from the solicitor. It was not incumbent on the solicitor to advise the donor not to make the gift. A solicitor best gives advice when he takes care that the client understands fully the nature and consequences of an act: *Coomber* v. *Coomber* (4). It was not necessary for the donee to obtain possession, to

(1) [1900] 1 Ch. 243.
(2) [1902] 1 Ch. 27.
(3) (1873) L. R. 8 Ch. App. 430.
(4) [1911] 1 Ch. 723, 729.

complete the gift: *Dharmodas Das* v. *Nistarini Dasi* (1), *Bai Rambai* v. *Bai Mani* (2).

Cur. adv. vult.

CHAUDHURI J. This is a suit brought by a Hindu *purdanashin* lady to set aside a voluntary deed of gift in respect of 13 Mullanga Lane, which she had executed on the 15th July 1908 in favour of the defendant. The case made by her in the plaint is that the defendant "taking advantage of her age and infirmity and helpless condition, obtained from her this deed of gift which she executed without any independent advice, being fully dominated by the defendant and in violation of the [illegible]d confidence reposed in him."

The defendant is the son of her husband's priest, and he has also been her priest since his father's death. The defendant accepted the position that the *onus* lay upon him to show the entire *bonâ fides* of the transaction, it being conceded by him that there was fiduciary relationship between himself and the plaintiff. The plaintiff's husband, Durga Charan Soor, died in June or July 1906. This property did not come to her through her husband, but it had been given to her by her father's sister from her own moneys, the property being purchased in the plaintiff's name. This house was, therefore, her *stridhan* property, and she held it in her own right. There is no question that she had a right of gift, if she chose to exercise it. Her husband had left him surviving some nephews, brother's sons who did not live in Calcutta, except one of them who stayed in the house of the plaintiff and another who used to come there from time to time. These persons were not her heirs. There has been a suggestion that the husband had desired the plaintiff to provide that after her death the property should go to the

(1) (1887) I. L. R. 14 Calc. 446. (2) (1898) I. L. R. 23 Bom. 234.

1912

KAMINI DASEE v. KRISHNA CHANDRA MUKERJEE.

CHAUDHURI J

nephews, but that the plaintiff had declined to make any such provision. She however says that she intended to make this property *debutter*, and her husband's nephews were to be *shebaits* after her death and she was to be the "*shebait* or *malik*" during her life time.

At the time of her husband's death, her mother was alive. The mother lived with the plaintiff, and it is said that it was her wish that the plaintiff should make a gift of the house to the defendant. The defendant says that he had been told by the plaintiff that her mother had taken her to the Jagganath Temple at Puri and made her swear in the temple that the property was to be made a gift of to the defendant. This story, however, the plaintiff denies. Her version is that he had on one occasion after the death of her husband, and also some little time before the execution of the deed, taken her to a room in her own house in Mullanga Lane where she used to keep a Lachmi Thakurani and made her swear that this property was to be given to the defendant. There is direct contradiction with regard to this matter, and it is difficult to decide which of the two versions, or if either of them, is true. It may however be inferred from what has been said by them that she considered it would be a meritorious or religious act to give the property to her priest. She had been so told by the witness Khettra Mohan Bhattacherjee, to whom I shall have to refer later.

The plaintiff's mother died on the 15th April 1908, shortly before the execution of the deed. That the plaintiff was in mental distress at the time is quite certain, and it also appears that she was not in good health. Her age was then about 60 years and she had had two great bereavements within two years. It was after the death of her mother that she made up her mind to make a gift of this property to the defendant,

first, because it is said she did not desire that the property should be touched by her husband's nephews, and, *secondly*, because she herself was anxious to go away to a holy place and live on such small resources as she had, settling this property permanently upon the defendant and seeing it secure in his possession and his "ownership of it made *pucca*." It is also alleged that the defendant was the *bhikshaputra* of the plaintiff.

The defendant says that when he was spoken to by the plaintiff with regard to this matter, he desired that she should send for a friend of the family, one Khettra Mohan Bhattacharjee, who has been examined as a witness in this case. Khettra Mohan says that he was consulted by the plaintiff, and pointed out to her that she had not very much to live upon, and if she made over this property to the defendant he might turn her out, and she had no other place of residence; but she insisted upon making the gift, and he thereupon took the title deeds from the plaintiff to the attorney, Dwijendra Mohan Ghose. This happened on or about the 1st July 1908. The attorney has been examined in this case, as also the attesting witnesses, with the exception of one Ashutosh Banerjee who is dead and also one Harinath Banerjee who identified this lady at the Registration office. The document is in the English language, which neither the plaintiff nor the defendant understands; but we have the evidence of the attorney that he explained this document to the lady at the time of the execution, and that before the execution he had read over the draft and explained it to her. He says he also told her that by making the gift she would "no longer have any interest in the property," but that it would become the defendant's. This the lady denies. The lady is hard of hearing, and it may be that she did not understand, but I certainly give credence to the

1912

KAMINI DASEE v. KRISHNA CHANDRA MUKERJEE.

CHAUDHURI J.

evidence of the attorney in this matter. He has given his evidence in the fairest possible manner. There is nothing to be said against him so far as the actual explanation of the document is concerned. But it is not possible to dispose of this case upon that alone. That evidence is not sufficient to discharge the *onus* which is upon the defendant.

Now, this gift is undoubtedly of a highly improvident character. It must be held upon the evidence that the lady has very little property, except this house. It is her only valuable property. It afforded her shelter and brought her also an income. The evidence of the defendant on this point is, that he had understood from her that, apart from the house, she "had kept Rs. 1,200" with a tenant of hers of the name of Srikrishna Mukherjee, that she had also some other money, but that he did not know the amount, and that she had also some gold ornaments, of what value he had no precise knowledge or information. Except what the lady had herself stated, he had no personal knowledge of her exact financial position. I do not think he has been candid in his statements, and it seemed to me that he attempted to exaggerate what the lady had. He admitted that the lady had given his wife a portion of her gold ornaments. He said he did not know how the *sradh* expenses of her husband and mother were met. His witness, Khettra Mohan Bhattacharjee, says that he came to know from the lady that she had a sum of Rs. 1,200 in deposit with Srikrishna Mukherjee, and that she had also some other money and ornaments. He was inclined to exaggerate the value of the ornaments; he first used the expression *bahumulya*, meaning "of great value," but subsequently stated that the value was about Rs. 2,000. Even taking the whole of this evidence as true, it shows that the resources of the lady

are very limited, and the substantial property she has is the house. It has also been proved that the lady has parted with some of her ornaments; she made a gift of some of them to the defendant's wife and she seems also to have sold a portion for defraying the *sradh* expenses. Both she and Srikrishna Mukherjee deny that the sum of Rs. 1,200 is in deposit with him. The house was for her very valuable, as she lived in it and also because it brought her an income of Rs. 19 a month. She had not to pay house-rent, and from the income derived from it she could manage to live. To make a free gift of this house, which left her without a roof over her head and deprived her of a permanent source of income, must be called improvident. A gift of this character, specially for an old lady who has nobody to look after her, must be called extremely improvident.

The case, therefore, is that of an old *purdanashin* lady with very slender means making an improvident gift to a person who was her priest and in a fiduciary relationship to her. To uphold a gift of this character would require strong evidence, showing that the whole of the circumstances were present to her mind, that the intention to give *was really her own voluntary act.* I need only refer to one or two cases which enunciate the principle, that it must be shown by the donee that the donor was in such a position as would enable her to form an absolutely free and unfettered judgment, and in particular that she had independent and competent professional advice. Dwijendra Babu's services as an attorney were secured, but it is difficult to say what his position was in this matter. Was he the attorney for the lady, or was he the attorney for both? No other attorney seems to have acted for the defendant. The instructions had originally come from Khettra Mohan

1912

KAMINI DASEE v. KRISHNA CHANDRA MUKERJEE.

CHAUDHURI J.

Bhattacherjee, said to be a friend of the plaintiff's husband, but he was the teacher of the defendant and had himself officiated as the plaintiff's priest in the absence of the defendant, or his father. I do not think it would be an unjustifiable assumption that Dwijendra Babu acted for both the parties. If he did so act, he placed himself in a false position, because the interests of the two persons were adverse; and although I entertain great respect for him, yet it seems to me to be difficult for any one to do his duty by two such parties in a transaction of this character. The position of an attorney under these circumstances is very clearly set out in *Powell* v. *Powell* (1). Farwell J. in that case says "a solicitor who accepts such a post, puts himself in a false position if he acts for both. He owes a duty to both to do the best he can for both. But the Court requires that the donor should be placed in as good a position as if he were in fact emancipated. The solicitor, therefore, must be independent of the donee in fact and not merely in name, and this he cannot be if he is a solicitor for both." But I am unwilling definitely to hold that Babu Dwijendra Mohan Ghose was acting for both the parties, and prefer to treat him as acting only for this lady. In that position, let me see, what his duties were to this lady in this transaction. I refer again to the observations of the learned Judge in *Powell* v. *Powell* (1). "A solicitor does not discharge his duty by satisfying himself simply that the donor understands and wishes to carry out a particular transaction. He must also satisfy himself that the gift is one that is right and proper for the donor to make under all the circumstances, and if he is not so satisfied, his duty is to advise his client not to go on with the transaction and to refuse to act further for him if he persists."

(1) [1900] 1 Ch. 243.

Now, let us see what Dwijendra Babu himself says he did in this matter. He was asked if he had enquired if the donee, her priest, had exercised any influence on her and what her means were. He said: "No, I was not told if she had any income, or what income, or if she had any other place of residence." If that is so, it seems to me that he had not placed himself in a position to advise the lady. It was not enough to prepare the document and explain it to the lady. Here the draft was prepared according to the instructions of Khettra Mohan Bhattacherjee. It was not enough to get her approval of the draft. The attorney should have enquired about her means, and tried to ascertain how her desire to give had been caused, or had arisen, what was leading her to give up her most valuable property. I do not think the attorney would not have enquired into these matters, if they had been present to his mind. He did not entertain any suspicion. He did not know this lady, or her family, or any circumstances relating to her life. He accepted what had been said to him by Khettra Mohan Bhattacharjee that she desired to give this house to the defendant if she could legally make a gift. He did not apply his mind to other matters, this being his first transaction of this nature. Nothing was said to him; no circumstances were made known to him by which he could have helped this lady. I think, however, there is a clear duty in cases like these, so far as the attorney is concerned, to try and protect the lady against herself. She was an old *purdanashin* lady and suffering from a recent bereavement, who had been ill and was in poor circumstances. It has been contended on behalf of the defendant that the duty cast upon an attorney was merely to see that the client understood the nature and effect of the deed, and nothing more, and my attention has been called to the case of *Coomber*

1912

KAMINI DASEE v. KRISHNA CHANDRA MUKERJEE.

CHAUDHURI J.

v. *Coomber* (1), and the following passage from the observations of Fletcher Moulton L. J., was cited:— "Again and again we have had it said the lady did not have competent and independent advice, and it seems to me to be based on the fact that the solicitor did not say to her 'I advise you to do it, or I would not advise you to do it.' In my opinion that is not by any means necessary for the purpose of the advice. I think that a solicitor best gives advice when he takes care that the client understands fully the nature of the act, and the consequence of that act. He is not bound to say: "I will advise you to do it, or if I were you I would not do it.' Nothing of that kind is necessary for competent and independent advice. All that is necessary is that some independent persons free from any taint of relationship, or of the consideration of interest which would affect the act, should put clearly before the person what are the nature and consequence of the act." But it will be seen from the latter portion of that paragraph that the learned Judge was of opinion that the duty became more onerous in certain cases. He says: "When a man takes upon himself the responsibility of advising those who are not adults, who are not persons capable of managing their own affairs in the broadest sense of the word, other conditions may arise." Now these Courts have always held that a *purdanashin* lady is not in the position of an adult male person, or an adult who is capable of managing his own affairs in the broad sense of the word. I need not refer to the rulings on the point. Her position is well-known. She is entitled to the protection which always extends to the weak, ignorant and infirm.

The observations made by the learned Judge and relied upon by the defendant had reference to the

(1) [1911] 1 Ch. 723.

facts of the case before him. In it there was no question of fiduciary relationship. It was a gift from mother to son. The attorney who had acted was the attorney for the father, and in making a deed of settlement the lady had taken into consideration the wishes of the father. All the circumstances were known to all the parties. The matter had been duly deliberated upon by the grantor who knew her position, and perfectly understood what she was doing. No new principle seems to have been enunciated in that case. All the decisions beginning from a very early period have been that independent advice is absolutely necessary in such cases, and such advice is to be given at arm's length: see Mr. Justice Phear's observations in *Kanai Lal Jowhari* v. *Kamini Debi* (1). With regard to the duty of the solicitor to enquire into the pecuniary means of his client, I will refer to *Wright* v. *Carter* (2) where it is pointed out that "it is the duty of a solicitor who is advising an intending donor or settlor under such circumstances to inform himself of the pecuniary means and prospects of his client with a view to advising him as to the expediency or otherwise of the proposed gift or settlement." This clearly the attorney in the present case did not do. He had not placed himself in a position to do it. I find, therefore, that the gift was an improvident one, and that the donor did not receive such advice as is required in such a case.

I, however, find the following facts in favour of the defendant, namely, that the draft was explained to this lady. She was told what the effect of the deed was, and its nature. I accept the evidence of Harinath Banerjea, who says that the Registrar asked her if she had executed the deed of gift and that she answered in the affirmative. I also find the account given by

(1) (1867) 1 B. L. R. (O.C.) 31 n. (2) [1903] 1 Ch. 27, 51.

1912

KAMINI DASEE v. KRISHNA CHANDRA MUKERJEE.

CHAUDHURI J.

this lady in the witness-box unsatisfactory. Her evidence has evidently been shaped according to what she has, I believe, been told to be necessary to prove, and she has not hesitated to tell untruths. Her story that she was not told that she was being taken to an attorney to have the document prepared, and that she did not know that she was going to the Registration office, which she called a garden house, are untrue. I do not believe her when she says that the document was not explained to her. But however much I disbelieve her story in the witness-box, I have to see if the defendant has properly discharged the *onus*. In *Lyon* v. *Home* (1) I find the learned Judge distrusted the plaintiff's story as to how she had been induced to make the gift.

I must also allude to the production of an account book by this lady, and an entry in it, which she said she had made in it showing that the sum of Rs. 186 had been paid by her to the defendant for the purpose of making "a will." She admitted in cross-examination that the entry was made only three or four months ago. The entry itself shows interpolations. It was evidently made for purposes of this case. This book shows that the lady can read and write a little and she can also add. This according to the defendant proved that she was not ignorant, and the fact that she kept an account showed her business capacity. I am unable to draw the same inference. The accounts are kept in a very unbusinesslike way, and her knowledge of Bengali seems to be of a very elementary character. The book also shows that she lends out small sums of money on interest which when collected helps to maintain her, and support a cow which she keeps. Her average expenses came up to about Rs. 50 a month, and some portion of it she probably

(1) (1868) L. R. 6 Eq. 655.

derived from the sums she had lent out. The fact, however, remains that the house is her most valuable property and the only source of a permanent income. She has examined one witness, her tenant named Srikrishna Mukerjee, but I am unable to rely upon his testimony. As he said little of importance, I do not think it necessary to deal with his evidence any further. He pretended ignorance of several matters, specially about the institution of this suit which rather tended to show that he knew all about it, and that he was responsible for the absurd story told by the lady in the witness-box.

In this connection, I may refer to an incident which occurred during the trial of this case. It was stated one morning that the case had been settled, and a document written in Bengali with the signature of this lady was produced. That document showed that the lady could not have understood her position when she signed it. It authorised her attorney to sell the house at a figure mentioned in it, and the proceeds of the sale were to be disposed of in paying the costs of both parties, the amount to be paid to the defendant being specifically mentioned. I enquired what the probable costs of the plaintiff were, and found that hardly anything was left for her at all. She said she had not realised that fact and had not been told. If she had understood the result of the settlement, she would not have consented. Counsel on both sides agreed that no effect should be given to such a settlement; and although the defendant had given instructions to consent to the terms which had been formally proposed and accepted by him, his counsel refused to take any advantage of the circumstance. In this, counsel upheld the best traditions of the Bar.

I am referring to this incident to show how easily *purdanashin* ladies in the position of the plaintiff can

1912

KAMINI DASEE v. KRISHNA CHANDRA MUKERJEE.

CHAUDHURI J.

be led to sign away their rights, even in matters of vital interest to them. It illustrates to my mind how easily they can be led or misled into such transactions. Everything was formally perfect, and yet it was conclusively shown that the plaintiff had not understood the effect of the proposed settlement. It also seemed to me that the price fixed for the sale of house in the document was for the benefit of Srikrishna Mukherjee. It is all important in these cases therefore to ascertain how the intention to give was created, and if the donor had exercised a free and unfettered judgment and realised the consequence of her act: see *Huguenin* v. *Baseley* (1), also *Hall* v. *Hall* (2). The same principle has been accepted and acted upon in our Courts. I have no doubt in my mind that her intention was created by the defendant and his friends working upon her religious feelings, and at a time when she was in great mental distress and had also been ill.

A story that the defendant was the plaintiff's *bhikshaputra* has been put forward. It is mentioned in the deed of gift. The lady denies that he was her *bhikshaputra*. The defendant gives one version of the matter which differs entirely from that of Khettra Mohan Bhattacharjee. Learned counsel for the defendant conceded that the evidence about this was contradictory and unacceptable. It is impossible to attach weight to such evidence and to hold that the youngman was taken as the *bhikshaputra* of the plaintiff. That the statement was introduced into the document shows that some weight was sought to be attached to it in justification of the gift, perhaps to show that the intention to give some valuable property to such a person had been entertained by the plaintiff for a

(1) (1807) 14 Ves. 273; 1 Wh. & Tud. 7th Ed. 247.

(2) (1873) L. R. 8 Ch. App. 430, 440.

long time. It is clear from her letters that this lady during her absence from Calcutta relied upon the defendant to make realizations for her and to send her moneys. The letters also showed that she was in great distress. They are addressed to the defendant in language which shows the respect which is due to a priest. The style is hardly that of one who had taken the defendant as her *bhikshaputra*. I, therefore, reject this part of the defendant's story.

The defendant states that he never intended to turn out this lady from the house, that she was to be in possession of the house as long as she lived, and it was not his intention to interfere with her collection of the rent. This he has repeated through his counsel. It is in evidence that even after the execution of the deed of gift the lady remained in possession, realized the rents, paid Collectorate and Municipal taxes and paid the expenses of repairs of a substantial character. If it was not the intention of the defendant "to turn her out," why does not the deed provide for it? The attorney was not told of such an intention, or of any tacit understanding between the parties that she was to be in possession during her lifetime. The provisions of section 126 of the Transfer of Property Act could have been availed of to secure the lady's position, and although I am not prepared to go to the extent contended for on behalf of the plaintiff that the absence of a power of revocation is enough to show that the document is invalid, I attach some importance to the fact of its absence. That I think is the result of the cases on this point: see *Hall* v. *Hall* (1). The attorney had not thought about the matter, and the provisions of the section were not present to his mind. I also attach much weight to the fact that in one matter at least, of great importance, the document does

(1) (1873) L. R. 8 Ch. App. 430.

1912

KAMINI DASSEE v. KRISHNA CHANDRA MUKERJEE.

CHAUDHURI J.

not express the intention of one of the parties, namely, that of the acceptor. He has never treated himself as, or done any act to show that he was the owner. Long after the deed, he came to live in it for a few days only, and left it without demur, because the lady insisted upon his leaving it, even at a time when her feeling was ceasing to be friendly.

Under all these circumstances, I hold that the defendant has failed to discharge the *onus*; he has failed to show that the lady had exercised, or was in a position to exercise her free and unfettered judgment, and clearly understood what she was doing. The suit therefore succeeds, and I hold that the lady is entitled to the relief she has asked for, namely, that the document is to be set aside. Inasmuch as I disbelieve the evidence she has given, I disallow her the costs of the days taken up by such evidence, allowing her only two days' costs of the hearing.

Judgment for plaintiff.

Attorneys for the plaintiff: *Ghosh & Bose.*

Attorney for the defendant: *Dwijendra Mohan Ghose.*

J. C.

PRIVY COUNCIL.

CLARKE

v.

BRAJENDRA KISHORE ROY CHOWDHURY,

(AND ANOTHER APPEAL CONSOLIDATED).

P.C.*
1912
April 30,
May 1,
June 18.

[ON APPEAL FROM THE HIGH COURT AT FORT WILLIAM IN BENGAL.]

Trespass—Right of Magistrate to order search for Arms—Criminal Procedure Code (Act V of 1898) ss. 36, 94, 96, 105, Schedule III (8) —Jurisdiction to issue search-warrant—Arms Act (XI of 1878) s. 25—Provision as to recording grounds for belief, in s. 25, whether mandatory or directory—Protection of Judicial Officers—Directing search where offence has been committed is judicial action—Charge of want of bonâ fides and malice reprobated.

For sometime prior to 27th April 1907, much ill-feeling existed in and about Jamalpore, a subdivision of Mymensingh, between the Hindu and Mahomedan communities, and much excitement and resentment had been aroused on account of the action of the Hindus in attempting some days before that date to enforce a boycott of *bideshi* or foreign goods. On 27th April, at night, a Mahomedan was wounded by a revolver shot fired by one of a party of Hindus, dressed as Mahomedans, who after the occurrence took refuge in some cutcherries belonging to the leading zamindars of the neighbourhood who were active sympathisers with the action of the Hindus. A crowd of Mahomedans at once collected, and proceeded to the cutcherries but were prevented from attacking them by the District Superintendent of Police, and the Subdivisional Officer, who, hearing of what had occurred proceeded to the cutcherries, and restrained the mob, thereby averting a serious riot. A large number of Hindus, some of them with arms, had collected in a temple close by, and having bolted and barred the doors refused admittance which was demanded by the District Superintendent of Police and the Subdivisional Officer. Shots were fired from inside the temple and a man in the crowd outside was wounded. The District Magistrate was then sent for and on his arrival on the morning of 28th April, he decided, in consultation with

* *Present :* LORD MACNAGHTEN, LORD ATKINSON, LORD SHAW, SIR JOHN EDGE AND MR. AMEER ALI.

1912

CLARKE v. BRAJENDRA KISHORE ROY CHOWDHURY.

the District Superintendent of Police and the Subdivisional Officer, that it was necessary to search the cutcherries to obtain possession of the arms used on the 27th, and others which it was reported to them were concealed there ; and also for the purpose of, and in connexion with, the investigation of the offences committed. The cutcherries were found locked, and as no officer or servant of the zamindars could be found, they were broken open under the District Magistrate's orders and instructions, and a search was made therein by the District Superintendent of Police and the men acting under his orders. No arms of any kind were found. In a suit for trespass against the District Magistrate, instituted by one of the zamindars whose cutcherry had been searched :—

Held (reversing the decision of the first Court and of the majority of the Appellate Court, and upholding the decision of BRETT J), that the search was warranted by the Code of Criminal Procedure (Act V of 1898). A serious offence had been committed against the public tranquillity into which it was the duty of the District Magistrate to enquire, and by virtue of his superior rank he was, at Jamalpore, the proper person to conduct the enquiry. By section 36, Schedule III, and section 96 of the Code the power of issuing a search-warrant was among his "ordinary powers," and therefore under section 105 he had power to direct a search to be made in his presence if he thought it advisable to do so.

That being so, it was unnecessary to decide on the other defences set up but, *semble*, (agreeing with the majority of the Court of Appeal) that the District Magistrate not having complied with the preliminary condition prescribed by section 25 of the Arms Act (XI of 1878) could not defend his action under that Statute. Also (agreeing with BRETT J.) that the District Magistrate in directing a general search of the plaintiff's cutcherry in view of an enquiry under the Criminal Procedure Code, was acting in the discharge of his judicial functions and, had it been necessary, might have appealed for protection to Act XVIII of 1850.

The charge of personal misconduct advanced and reiterated without any shadow of proof deserved the severest reprobation.

TWO consolidated appeals (65 and 66 of 1911) from a judgment and decrees (20th February 1909) of the High Court at Calcutta in its Appellate Civil Jurisdiction, which affirmed the judgment and decrees (19th June 1908) of the same Court in the exercise of its Ordinary Original Civil Jurisdiction.

The defendant was the appellant to His Majesty in Council in both appeals.

The only questions for determination in these appeals were as to whether a search made under the direction of the appellant as Chief Magistrate of the District upon the premises of the respondents constituted an actionable trespass, and whether the appellant was liable in damages therefor.

Both the suits out of which the present appeals arose were instituted on 25th July 1907 in the Court of the third Subordinate Judge of Mymensingh; the plaintiffs being respectively Brajendra Kishore Roy Chowdhury, the respondent in appeal 65, and Srimati Bisweswari Debi Chowdhurani, the respondent in appeal 66. The allegations made and the reliefs sought by the two plaintiffs were similar as was the defence in each suit.

The suits were, by an order made in the exercise of the Extraordinary Original Civil Jurisdiction of High Court, transferred from the Court of the Subordinate Judge to the High Court and came on for hearing before FLETCHER J., sitting in exercise of the Ordinary Original Jurisdiction of the Court, who gave the plaintiff a decree for Rs. 500 with costs. An appeal by the defendant was heard by SIR FRANCIS MACLEAN C.J. and HARINGTON and BRETT JJ. and the decree of the first Court was affirmed (but without costs) by a majority of the Court (BRETT J. dissenting).

The facts of the cases and the pleadings are fully stated in the report of the appeal to the High Court which will be found in I. L. R. 36 Calc. 433 where the judgments of the Original and Appellate Courts are set out.

An application to the High Court for leave to appeal to His Majesty in Council was refused; but by an order of His Majesty in Council on 30th June 1910 special leave was granted on the appellant's

1912

CLARKE v. BRAJENDRA KISHORE ROY CHOWDHURY.

undertaking to abide by any order as to costs that their Lordships might see fit to make on the hearing of the appeal.

On these appeals,

Sir Erle Richards, K.C., and *Kenworthy Brown*, for the appellant, contended that on the evidence the necessity and justification for the search had been established; and the *bonâ fide* belief of the appellant and of the Superintendent of Police, and substantial ground for their belief that arms were concealed in the cutcherries had been proved. The law applicable to the case was not the common law of England as held by the Courts below, but the rule of justice, equity, and good conscience; and the Acts pleaded in defence were, it was submitted, sufficient, under the circumstances, to justify the search; which therefore did not constitute an actionable trespass. Reference was made to the Criminal Procedure Code (Act V of 1898), sections 94, 95, paragraph 2 (as to production and inspection of documents and other things), 96 (as to issue of search-warrants), which section was not limited to specific offences against specific individuals, 104 (power to impound documents or things), 105 (power of Magistrate to direct a search in any place for the search of which he is competent to issue a search-warrant), 154-160 (information of offence and power of investigation), 165 (power of search by police officer), under, which the appellant was justified and protected. Section 96 was not confined to a person acting as a "Court" within section 94: section 32 used the word "Court": section 36 said "all District Magistrates": Section 96 gave powers to "Magistrates," the words being used interchangeably; the Police Act (V of 1861), section 4; and the Arms Act (XI of 1878), sections 25, 26. The search was made

and intended to be made, under the powers conferred by the Criminal Procedure Code in connexion with the offences committed with firearms, as well as under the Arms Act, and not only under the latter Act as was wrongly held by the first Court. The mere fact that the appellant did not "record the grounds of his belief" that there were arms concealed in the building before making the search, did not prevent him from taking advantage of section 25 of the Arms Act as a protection. The words "having first recorded the grounds of his belief," were, it was submitted, merely directory and not mandatory. Reference was made to *Liverpool Borough Bank* v. *Turner* (1) per CAMPBELL L. C.: *Margate Pier Company* v. *Hannam* (2) per ABBOTT C. J.: *King* v. *Patteson* (3) per PARKE J.: and Maxwell on Statutes, 4th Ed. 554.

But in any event the appellant was protected by Act XVIII of 1850; there was no doubt he was acting in a judicial capacity: see *Hope* v. *Evered* (4) per COLERIDGE, C. J.; *Lea* v. *Charrington* (5) per POLLOCK B.: *Mahomed Jackariah & Co.* v. *Ahmed Mahomed* (6); and *Seshaiyangar* v. *Ragunatha Row* (7) per SCOTLAND C.J.

De Gruyther, K.C., and *J.M. Parikh*, for the respondents, contended that the search, under the circumstances, and in the way it was made, was not justified. It was a general search for arms, and not for any particular weapon. The appellant had not acted with any judicial discretion: he made up his mind to search all the Hindus for arms, and he did so, and made a general search of the cutcherries, and the occasion and the circumstances did not justify his

(1) (1860) 30 L. J. Ch. (N. S.) 379.
(2) (1819) 3 B. & Ald. 266, 269.
(3) (1832) 4 B. & Ad. 9.
(4) (1886) L. R. 17 Q. B. D. 338.
(5) (1889) L. R. 23 Q. B. D. 45.
(6) (1887) I. L. R. 15 Calc. 109, 139.
(7) (1870) 5 Mad. H. C. 345, 353.

1912

CLARKE v. BRAJENDRA KISHORE ROY CHOWDHURY.

action. The search was not and was never intended to be a search under section 165 of the Criminal Procedure Code: there was no evidence that any police officer made the search, or caused the search to be made under that section which related to the production of a document or thing necessary to an investigation. To justify a forcible entry on another man's property some authority for doing so must be shown, and that such forcible entry was necessary. There was no proper authority here. As to this there were concurrent findings by the first Court, and by the majority of the Appellate Court as to the character and nature of the search that was made. The action of the appellant was not warranted by the Criminal Procedure Code. The powers of the various classes of Magistrates and other Judicial Officers were specified in sections 31, 32 and Schedule II, column 8. In such a case as this a Magistrate could not take action without initiation. Reference was made to the Criminal Procedure Code, sections 106, 107, 109, 133, 149, 155, 156, 157, 160, 161, where the action of a Magistrate must be founded on information, or report of the police after "inquiry" or "investigation"; see section (4) (*k*) and (*l*), Chapter XV, sections 190, 191, where he cannot take cognizance of an offence without (*a*) a complaint, (*b*) a report from the police, or (*c*) information from a person other than the police. In such cases the Magistrate must be sitting as a Court, or acting in a judicial capacity. Some cases the Magistrate cannot deal with himself, but must refer them to the Sessions Court or the High Court. If he acted on his own suspicion or knowledge (as he did in the present case) he must issue a summons or a warrant: see sections 68, 75, 94, 165, 200, 204, 206, 241, 251.

In the present case the appellant, as a Magistrate, was not sitting as a "Court" and no "proceeding" or

"inquiry" had been initiated before him: he could not, under section 105, with sections 94 and 96, have issued a search-warrant, nor institute a search. *Rash Behary Lal Mandal* v. *Emperor* (1); *In re Harilal Buch* (2). The words of section 96 are "if any Court" which did not include a Magistrate acting in the collection of evidence.

The appellant was not acting judicially and therefore was not protected under Act XVIII of 1850. Reference was made to *Doswell* v. *Impey* (3); *Houlden* v. *Smith* (4). *Bonâ fide* belief in his power to try the case must be shown: *Mitchell* v. *Foster* (5), and *Sinclair* v. *Broughton* (6).

As to section 25 of the Arms Act the appellant was not entitled to rely upon it not having (as he himself admitted) complied with its provisions by recording his grounds for believing arms were in the cutcherries. The first Court thought the defence under the Arms Act was merely an afterthought, and, it was submitted, the appellant did not come to any conclusion as to any arms being in the house, so as to entitle him to proceed under the Arms Act on any information he received. See rules under the Arms Act in North-Western Provinces. It was also contended that the first Court rightly held that the appellant exercised no control over the manner in which the search was conducted, and that so carried out it was not warranted by law, and was an actionable wrong.

Sir Erle Richards, K.C., in reply. Section 96 of the Criminal Procedure Code did not contain the words "by or before a Court," and therefore was not limited

(1) (1908) I. L. R. 35 Calc. 1076, 1081.
(2) (1897) I. L. R. 22 Bom. 949, 955, 956.
(3) (1823) 1 Barn. & Cres. 163; 1 L. J. (O. S.) Q. B. 99.
(4) (1850) 19 L. J. (N. S.) Q. B. 170.
(5) (1840) 12 Ad. & E. 472; 9 L. J. (N. S.) M. C. 95.
(6) (1882) I. L. R. 9 Calc. 341; L. R. 9 I. A. 152.

1912

CLARKE v. BRAJENDRA KISHORE ROY CHOWDHURY.

in the way contended for the respondents. Where powers were given to particular Judicial Officers, the particular officer was specified. If to a "Magistrate" the word "Magistrate" was given. But where the word "Court" was used it was meant to extend to all Judicial Officers. Taking cognizance of a case was not limited to cases the Magistrate has actually before him. There was no power to make rules under the Arms Act. The appellant was acting in a judicial capacity. Reference was made to 11 & 12 Vict. c. 44 under which all cases of Justices jurisdiction came; and to *Calder* v. *Halket* (1).

June 18.

The judgment of their Lordships was delivered by LORD MACNAGHTEN. The pecuniary amount involved in this appeal is comparatively trifling. But the case is one of grave importance, and their Lordships are compelled to add that, in their opinion, there has been a serious miscarriage of justice in both the Courts which dealt with the matter in India.

In April 1907, Mr. Clarke, the appellant, was the District Magistrate of Mymensingh, an extensive district in the Province of Bengal. The principal suit, the result of which governs this consolidated appeal, was brought by the first respondent, as plaintiff, claiming damages for trespass on the allegation that Mr. Clarke had illegally and wantonly searched his cutcherry, and that Mr. Clarke had not only acted illegally, but that he had acted out of personal malice and ill-will. The suit, originally brought in the Court of the third Subordinate Judge of Mymensingh, was transferred, at the plaintiff's instance, to the High Court in its Extra-ordinary Original Civil Jurisdiction. It was tried by Fletcher, J. He found in favour of the plaintiff and gave a decree for Rs. 500, but without(?)

(1) (1840) 3 Moo. P. C. 28, 74; 2 Moo. I. A. 293, 307.

costs. Costs were not awarded to the successful plaintiff on account of the charge of personal misconduct which his Lordship held to be unfounded and grossly improper. Mr. Clarke appealed to the High Court in its Appellate Jurisdiction. The plaintiff filed cross-objections reiterating his charge of personal misconduct. The Court of Appeal, consisting of the late Chief Justice and Harington J. (Brett J. dissenting) dismissed the appeal but without costs.

The result is that a Magistrate placed in a very difficult position and called upon to act on a sudden emergency has been adjudged guilty of trespass and subjected to a fine though he seems to have acted properly, with courage and good sense, and strictly in accordance with the powers committed to him.

The facts of the case are not really in dispute.

Jamalpur is a subdivision of Mymensingh. The zamindars in that part of the country are Hindus, most of them, apparently, absentees living in Calcutta. The bulk of the population is Mahomedan. For some time before the occurrence which led to this suit owing, it was said, to the measure known as the Partition of Bengal, there had been a good deal of disaffection and excitement in the district, and the relations between the Hindus and the Mahomedans were dangerously strained.

On the 21st of April 1907 there was a large fair or *melâ* held at Jamalpur. Some Hindus, apparently at the instance of the servants and agents of the plaintiff and his co-sharers, known collectively as the Gouruckpur (? Gouripur) zamindars, tried to prevent the sale of *bideshi* or foreign goods. The Mahomedans resented this attempt. There were serious disturbances out of which there sprang up a bitter feeling between the Hindus and the Mahomedans. On the evening of the 27th of April some Hindus dressed or supposed to

1912

CLARKE v. BRAJENDRA KISHORE ROY CHOWDHURY

be dressed in Mahomedan clothes were observed wandering about the town. They were followed by a band of Mahomedans. The Hindus turned on the men following them and fired three or four revolver shots and a Mahomedan was wounded. An uproar followed. Mr. Barniville, the Subdivisional Magistrate of Jamalpur, and Mr. Luffman, the District Superintendent of Police, who were then in the Dâk Bungalow, hastened to the scene of disturbance. They met some Mahomedans carrying away the wounded man, and they received information that the persons who had committed this offence had fled in the direction of the cutcherries of the Gouruckpur (?) zamindars. These cutcherries appear to be close together in an open piece of ground. Hard by is a temple of Thakurain Doya Moyee. An excited crowd of Mahomedans was collected there apparently bent on attacking the cutcherries. The Subdivisional Magistrate and the District Superintendent of Police found 40 or 50 men armed with lathies. After they had disarmed them they were told that armed men were concealed in the temple. They went there. They found the doors locked and were refused admittance. The Subdivisional Magistrate ordered the persons inside to open the doors assuring them of protection. In response several shots were fired from inside, and a man was wounded slightly. The two officers then withdrew after dispersing the Mahomedan crowd outside.

The Subdivisional Magistrate wired at once to the Commissioner of the Division, and the District Superintendent of Police sent a telegram to Mr. Clarke to the following effect:

"Serious riot just averted, come at once."

Mr. Clarke received this telegram at 2 A.M. on the morning of the 28th of April. He started for Jamalpur by the first train, and arrived there at 10 A.M. On

his arrival he found the following telegram from the Commissioner headed "Urgent" :—

"Barniville has wired for available armed police by special train, saying serious disturbance impending. What do you know? Can you send Gurkhas from Mymensingh to be replaced if required by men from here?—Dacca."

Mr. Clarke, who had spent most of his time after the *melâ* disturbance between Jamalpur and Mymensingh, and knew the state of feeling in the district, took counsel with the Superintendent of Police and the Subdivisional Magistrate. From what he heard and from what he knew himself he came to the conclusion that it was his duty to search the cutcherries. And accordingly he did so, accompanied by the Subdivisional Magistrate, the police officer, and a force of police. The plaintiff's cutcherry was found locked. It seems that the jamadar in charge of the building had locked it up, and left at 1 P.M. There was no one on the ground to open the doors. So the doors were forced open. Boxes in the cutcherry were also opened and their contents taken out. The actual search within the building was made by the police, but Mr. Clarke had charge and direction of the whole proceeding. He remained outside.

There was nothing of an incriminating nature found in the cutcherries.

The question and the only question on this appeal is whether Mr. Clarke was authorised by law to make the search. That depends on the provisions of the Code of Criminal Procedure and on nothing else.

It cannot be denied that a serious offence had been committed against the public tranquillity and that under the Indian Penal Code (which defines offences against the public tranquillity and is summarised in Chapter VIII, of Schedule II, of the Criminal Procedure Code) every member of the unlawful assembly from

1912

CLARKE v. BRAJENDRA KISHORE ROY CHOWDHURY.

which the shots proceeded was equally guilty of the offence. Nor can it be disputed that it was the duty of the District Magistrate to enquire into that offence.

Now section 177 of the Code provides that every offence shall ordinarily be enquired into, and tried by a Court within the local limits of whose jurisdiction it was committed. Mr. Clarke, by virtue of his superior rank, superseded the Subdivisional Magistrate of Jamalpur, and properly assumed jurisdiction there.

An enquiry under the Code is a proceeding distinct from a trial. There is no definition of the word "enquiry" in the interpretation clause, section 4. But there is this explanation of the term as used in the Code :—

"(*k*) Enquiry includes every enquiry other than a trial conducted under this Code by a Magistrate or Court."

Section 36 is in the following terms :—

"All District Magistrates, Subdivisional Magistrates, and Magistrates of the first, second, and third classes have the powers hereinafter respectively conferred upon them and specified in the third schedule. Such powers are called their 'ordinary powers.'"

Schedule III, referring back to section 36 defines the "ordinary powers" of Provincial Magistrates beginning with Magistrates of the third class. Every Magistrate of a higher class is invested with all the "ordinary powers" of a Magistrate of the class immediately below that to which he belongs, with further powers appertaining to Magistrates of his own grade.

Among the "ordinary powers" of a Magistrate of the third class specified in Schedule III is :—

"(8) Power to issue search-warrants. Section 96."

In section 96 the following provision occurs :—

"Where the Court considers that the purpose of any enquiry, trial, or other proceeding under this Code will be served by a general search or inspection, it may issue a search-warrant."

Then section 105 provides as follows :—

" Any Magistrate may direct a search to be made in his presence of any place for the search of which he is competent to issue a search-warrant."

It seems clear from these sections and Schedule III that Mr. Clarke was authorised by the Code to direct a search of the plaintiff's cutcherry in his presence if he considered it advisable to do so.

Now the learned Trial Judge disposes of Mr. Clarke's defence in rather a summary manner. Beyond referring to section 105 he does not consider or refer to any one of the sections on which the defence is based, nor does he deal with Schedule III at all. All that the learned Judge says on this part of the case is this :—

" It is obvious in the present case the defendant was not competent to issue a search warrant under the provisions of the Criminal Procedure Code. The defendant was not acting as a Court within the meaning of section 94 of the Criminal Procedure Code, as there was no proceeding pending before him."

On appeal the late C. J. and Harington J. took the same view and dealt with the matter much in the same way. After citing section 105, the learned C. J. proceeds as follows :—

" The Magistrate can only act under this section where he is competent to issue a search-warrant. That takes us to section 96. That section applies to the issue of a search-warrant by the Court. Here the defendant was not acting as a Court, and all that section 105 enacts is that instead of the Court issuing a search-warrant the Magistrate may direct a search to be made in his presence. It is reasonably obvious why this power is given to a Magistrate, but the section does not assist the present defendant."

The opinion of Harington J. is to the same effect. He says :—

" In my opinion section 96 only authorises the Magistrate to issue a search-warrant when sitting as a Court, *i.e.*, when some proceeding under the Code has been initiated before him. And this view is strengthened by the form of the search-warrant given in Schedule V which recites that information has been laid or complaint has been made."

If his Lordship had read to the end of the form in Schedule V he would have seen that it disposes of

1912

CLARKE v. BRAJENDRA KISHORE ROY CHOWDHURY.

his theory altogether. The form contemplates the issue of a search warrant before any proceedings of any kind are initiated and in view of an "enquiry about to be made."

It would seem that the Trial Judge and both the learned Judges who formed the majority of the Court of Appeal were misled by the use of the word "Court" in section 96. For the sake of brevity the Code uses the terms "Court" and "Magistrate" generally, if not always, as convertible terms. Section 6 headed "Classes of Criminal Courts" enacts that :—

"Besides the High Courts and the Courts constituted under any law under this Code for the time being in force there shall be five classes of Criminal Courts in British India, namely :—

i. Courts of Session.
ii. Presidency Magistrates.
iii. Magistrates of the First Class.
iv. Magistrates of the Second Class.
v. Magistrates of the Third Class."

Section 36 taken in conjunction with Schedule III places the matter beyond all doubt. The ordinary powers of all Provincial Magistrates are declared to be those "hereinafter conferred upon them and specified in the third schedule." That means: conferred upon them by the Act and specified in the third schedule to the Act. As appears by the schedule the power to issue search warrants is specified among the "ordinary powers" of all Provincial Magistrates, but the only section conferring the power is section 96 to which the schedule itself refers.

It seems to their Lordships therefore clear that what Mr. Clarke did was warranted by the Code. If that be so, there is an end of the case.

Two other points were discussed by the Trial Judge and the learned Judges of Appeal at much greater length than the ground on which the real defence to the action was based. It seems that the

defendant or his advisers not content with relying on the Code of Criminal Procedure, unwisely perhaps prayed in aid section 25 of the Indian Arms Act, 1878, and also Act No. XVIII of 1850, entitled "an Act for the protection of Judicial Officers." The one seems inapplicable; the other in the present case wholly unnecessary. Their Lordships are disposed to agree with the majority of the Court of Appeal that Mr. Clarke not having complied with the preliminary condition prescribed by the Arms Act cannot defend his action under that Statute. On the other hand they have no doubt that Mr. Clarke in directing a general search of the plaintiff's cutcherry in view of an enquiry under the Code of Criminal Procedure was acting in the discharge of his judicial functions, and they think that if it had been necessary he might have appealed for protection to the Act No. XVIII of 1850.

Their Lordships think that there was no foundation for the suit. Mr. Clarke's action under the circumstances was quite justified. The charge of personal misconduct advanced and reiterated without any shadow of proof deserves the severest reprobation.

Their Lordships will, therefore, humbly advise His Majesty that this appeal ought to be allowed, the order of the Court of Appeal discharged, and the suit dismissed with costs in both Courts.

The respondent must pay the costs of the appeal.

Appeal allowed.

Solicitor for the appellant: *The Solicitor, India-Office.*

Solicitors for the respondents: *Downer & Johnson.*

J. V. W.

CRIMINAL REVISION.

Before Mr. Justice Holmwood and Mr. Justice Imam.

1912

June 18.

RAM PRATAP NEMANI

v.

EMPEROR.*

Cotton-gambling—"Gambling" and "Wagering," distinction between—Calcutta Police Act (Beng. IV of 1866 as amended by Beng. Act III of 1897), s. 44—Common gaming house—Instruments of gaming—Cotton-gambling not a game of contest.

Betting must always be on an uncertain event, and betting in itself, apart from stakes being laid on a particular game or instrument of gaming in a public place, is not penal.

Playing with cards, dice or money is penal if done in a public place.

The offence as created by the Calcutta Police Act is a purely technical one, and nothing has ever been done on this side of India to include any form of betting or wagering without instruments in the offence, except in the single case of rain-gambling without a machine; and in order to include this, extraordinary legislation has had to be undertaken to make the books and registers in which rain-gambling wagers are entered and all other documents containing evidence of such wagers instruments of gaming.

Gaming is playing at any game, sport, pastime or exercise, lawful or unlawful, for money or any other valuable thing which is staked on the result of the game, *i.e.*, which is to be lost or won according to the success or failure of the person who has staked.

Reg. v. *Ashton* (1), *Lockwood* v. *Cooper* (2) referred to.

Wagering which includes betting is making a contract on an unascertained event past or future (in which the parties have no pecuniary interest other than that created by the contract) by which the parties are to gain or lose according as the uncertainty is determined one way or the other.

Carlill v. *The Carbolic Smoke Ball Co.* (3) referred to.

*Criminal Revision, Nos. 636 and 637 of 1912, against the order of E. Keays, 2nd Presidency Magistrate of Calcutta, dated May 6, 1912.

(1) (1852) 1 El. & Bl. 286. (2) [1903] 2 K. B. 428.
(3) [1892] 2 Q. B. 484.

Cotton-gambling is 'betting' pure and simple.
Hari Singh v. *Jadu Nandan Singh* (1) referred to.

THE facts are shortly these: The first accused was charged under section 44 of the Police Act with being the owner or keeper, and the other accused with assisting in the management of a common gaming house at 20-1, Bow Bazar Street, where was carried on what is known as cotton figure gambling.

Cotton figure gambling consists in betting on the last figure of the average of the figures of the prices of cotton in New Orleans and New York cabled out by Reuter—four of the prices being future prices and one price being known as "spot." It was proved that the first accused had rented the premises No. 20-1, Bow Bazar Street, and that persons of all classes, creeds and ages resorted to the premises to gamble, and that no restriction was placed upon the persons from whom the accused accepted wagers.

The accused made no statement. It was contended on his behalf that gaming and wagering were distinct inasmuch as "gaming" involved a contest. It was further contended that rain-gambling, which was merely wagering, has been expressly legislated against and therefore all other form of wagering were legal.

The 2nd Presidency Magistrate convicted the accused under s. 44 of the Police Act (IV of 1866) and sentenced them to one month's rigorous imprisonment. Thereupon, the petitioners moved the High Court and obtained the present Rule.

The Standing Counsel (Mr. B. C. Mitter) (with him *Mr. S. Roy*), for the Crown, submitted that it was a limited Rule, confined only to a point of law, and that point of law was whether cotton figure gambling came within the scope of the Act under which the

(1) (1904) I. L. R. 31 Calc. 542; 8 C. W. N. 458.

1912

RAM PRATAP NEMANI v. EMPEROR.

petitioner has been convicted. He admitted that there was a distinction recognised between gaming and wagering, but he contended that this was gaming and not wagering. In *Queen-Empress* v. *Narottam Das* (1) the question was one of rain-gambling which did not depend on any act of the parties. Here it was not so. Here you had to add up the figures, divide, and so on. Further, even if the game was a perfectly lawful one, it would be an offence if it was played in a common gaming house. The Century Dictionary and the Encyclopædia Britannia, 11th edition, vol. II., p. 446, referred to. It was further submitted that in gaming some instrument was always required; while in wagering it need not be so. The instruments here were the board, vouchers, books, etc. (exhibts in the case). If these were necessary—and it was submitted that they were necessary—for the purpose of the game, then they were instruments of gaming. He relied on the case, *Anonymous Reference* (2), by the Recorder of Rangoon, which was a case of lottery, and submitted that when an exposition of law had been made and was not reversed by subsequent legislation, the presumption was that the Legislature was cognisant of it and had impliedly given sanction to it: *Tollet* v. *Thomas* (3).

Mr. Jackson (with him *Mr. St. John Stephen*, *Mr. C. R. Das*, *Mr. Khuda Bukhsh* and *Babu Manmatha Nath Mukerjee*), in support of the Rule, referred to *In re Hallett's Estate* (4); *Queen-Empress* v. *Govind* (5); *Queen-Empress* v. *Kanji* (6); *Emperor* v. *Tribhovandas* (7); *Emperor* v. *Jusub Ally* (8), though not called upon.

Cur. adv. vult.

(1) (1889) I. L. R. 13 Bom. 681.
(2) (1869) 12 W. R. (Cr.) 34.
(3) (1871) L. R. 6 Q. B. 514.
(4) (1880) 13 Ch. D. 696, 712.
(5) (1891) I. L. R. 16 Bom. 283.
(6) (1892) I. L. R. 17 Bom. 184.
(7) (1902) I. L. R. 26 Bom. 533.
(8) (1905) I. L. R. 29 Bom. 386.

1912

RAM PRATAP NEMANI v. EMPEROR.

HOLMWOOD AND IMAM JJ. The question upon which this Rule was issued is whether a certain form of gambling which has become well-known in Calcutta as cotton-gambling comes within the provisions of section 44 of Act IV of 1866 as amended by Act III of 1897 (B.C.).

We may say at the outset that this is a pure question of law and has nothing to do with the nature and effect of the particular form of gambling now under consideration, which may be, and in our opinion is, a most pernicious form of gambling, and yet may not be rendered penal by the Act under which these convictions have been held.

The offence which is created by section 44 of the Calcutta Police Act is that of owning or keeping or being employed in a common gaming house, or advancing or furnishing money for the purpose of gaming with persons frequenting that house.

The question then that arises in this case is whether the premises in which the defendant carried on this cotton-gambling is "a common gaming house" within the definition given in the Act. That definition is "The words 'common gaming house' shall be taken to mean any house, room or place in which cards, dice, tables or other instruments of gaming are kept or used for the profit or gain of the person owning or keeping such house, room or place, whether by way of charge for the use of the instruments of gaming, or of the house, room or place or otherwise" (section 3, Act IV of 1866). By Act III (B.C.) of 1897 the following was added to the definition of "common gaming house" in section 3 of the Calcutta Police Act, 1866: "or in which rain-gambling, that is to say, wagering on the occurrence or non-occurrence of rain, is carried on for the profit or gain of any such person as aforesaid."

1912

RAM PRATAP NEMANI v. EMPEROR.

After the said definition was inserted: "'gaming' shall include rain-gambling; 'instruments of gaming' shall include books or registers in which rain-gambling wagers are entered, all other documents containing evidence of such wagers, and anything used as a means of rain-gambling." Clearly, therefore, by this enactment the Legislature declared that it was doubtful whether rain-gambling came within the scope of the Act before this amendment, and if it was doubtful there could be no conviction.

In the year 1889 the Bombay High Court had held in the case of *Queen-Empress* v. *Narottamdas Motiram* (1) that Bombay Act IV of 1887, a similar Act to the Calcutta Police Act, did not apply to betting, and that there was no law in India which made betting illegal. There is a distinction between betting and gaming, and to constitute a game there must be a contest and an active participation of certain persons is also necessary—merely watching rainfall was no contest and no active participation taken by the bettors. Rain-betting is therefore not a game, and the place where it is carried on is not a "common gaming house." In the year 1904, seven years after the Amending Act III of 1897 dealing with rain-gambling had been passed, this ruling was considered by a Bench of this Court in the case of *Hari Sing* v. *Jadu Nandan Sing* (2) where it was held that the machine known as, "little horses" was an instrument of gaming and that the act complained of was done in a public place.

These, as pointed out by Ghose J., were the only points for decision, and he held that the questions decided in the Bombay case which was much pressed before this Court was not in point, as it certainly is

(1) (1889) I. L. R. 13 Bom. 681. (2) (1904) I. L. R. 31 Calc. 542; 8 C. W. N. 458.

not, if the *ratio decidendi* is confined to the dicta which we have cited above from the placitum. But it was pointed out in a concurrent judgment by Stephen J. that the Bombay Court had gone further, and he felt bound to express doubts which he felt as to the soundness of the judgment in *Queen Empress* v. *Narottam Das Motiram* (1).

We do not quite follow him in his dictum that a more satisfactory distinction between gaming and betting is to be found by considering the popular rather than the scientific use of the word "game."

He lays down, as all the cases have laid down, that the Gambling Act has nothing to do with betting or wagering which may be considered synonymous terms. It is concerned only with gaming. It would appear therefore that all forms of betting and wagering which do not depend on the manipulation of instruments of gaming are excluded from the Act. He clearly holds that apart from legislation rain-gambling is gaming if a complete apparatus is used for the purpose, otherwise it is not. Here we are in entire agreement with him, and we are not prepared to hold that the Bombay case so far as it decided that a special apparatus consisting of a gutter and (a rain gauge used for the purpose of gambling), and for no other purpose is not an instrument of gaming was righly decided.

But we cannot agree that the difference between gaming and betting depends on the event on which the bet is made. Betting must always be on an uncertain event, and betting in itself, apart from stakes being laid on a particular game or instrument of gaming in a public place, is not penal. Playing cards for money, whatever the game, is not penal unless the

(1) (1889) I. L. R. 13 Bom. 681.

1912

RAM PRATAP NEMANI v. EMPEROR.

game is played in a public place. Playing with cards, dice or money is penal, if done in a public place, whether it is ostensibly for money or not. It may be that horse racing if it degenerates into nothing but an occasion for betting becomes gaming, but that is because the race-horses may as Stephen J. points out then probably become instruments of gaming. We do not say that they do, but the criminality if any lies not in betting but in placing stakes publicly upon instruments of gaming for the pecuniary benefit of those who keep the racing establishment.

The offence as created by the Calcutta Act is a purely technical one and nothing has ever been done on this side of India to include any form of betting or wagering without instruments in the offence except in the single case of rain-gambling without a machine, and in order to include this extraordinary legislation has had to be undertaken to make the books and registers in which rain-gambling wagers are entered and all other documents containing evidence of such wagers instruments of gaming.

This they could not possibly be except for this express enactment, for evidence of a transaction cannot be the *causa causans* or instrument for carrying out that transaction.

This has a most important bearing on this case since as we shall presently see the only alleged instruments of gaming produced in this case are the books and papers, notice boards and lists of prices which furnish evidence of the gambling upon cotton quotations which is the subject of this rule.

The distinction between gaming and wagering is clearly laid down by certain English authorities, and though the English Statutes do not apply in this country the distinction between wagering and gaming which has never been defined in any Indian Act

may very well be gathered from the considered findings of English Judges.

Gaming is playing at any game, sport, pastime or exercise, lawful or unlawful, for money or any other valuable thing, which is staked on the result of the game, *i.e.*, which is to be lost or won according to the success or failure of the person who has staked. *Reg.* v. *Ashton* (1), *Lockwood* v. *Cooper* (2). Wagering which includes betting is making a contract on an unascertained event past or future (in which the parties have no pecuniary interest other than that created by the contract) by which the parties are to gain or lose according as the uncertainty is determined one way or the other: *Carlill* v. *The Carbolic Smoke Ball Co.* (3). The general effect of the legal meaning of these terms as interpreted by the Judges is well set out by Mr. W. F. Craies, the well-known authority on the Interpretation of Statutes, whose remarks we may adopt as expressing our own view on the subject. "It is somewhat difficult," he says, "exactly to define or adequately to distinguish these terms of allied meaning. The word 'game' is applicable to most pastimes and many sports irrespective of their lawful or unlawful character. 'Gaming' is now always associated with the staking of money or money's worth on the result of a game of pure chance or mixed skill and chance, and 'gambling' has the same meaning with a suggestion that the stakes are excessive or the practice otherwise reprehensible, while wager and wagering are applied to money hazarded on any contingency in which the person wagering has no interest at risk other than the amount at stake. Betting is usually restricted to wagers on events connected with sports or games,

(1) (1852) 1 El. & Bl. 286. (2) [1903] 2 K. B. 428.
(3) [1892] 2 Q. B. 484.

1912

RAM PRATAP NEMANI v. EMPEROR.

and 'lottery' applies to speculation to obtain prizes by lot or chance."

We mention this last because reference has been made at the bar to the case of *Anonymous Reference* by the Recorder of Rangoon (1) dated 28th July 1869 upon Act III of 1867, an Act which contained similar provisions to Act IV of 1866. There it was held that lottery tickets by reference to which it is to be decided whether the holder or purchaser wins the whole or any part of any stakes are instruments of gaming similar to cards. This is not a judicial decision inasmuch as no specific case was before the Court, but any dictum of Barnes Peacock C. J., and Dwarka Nath Mitter J. carries with it weighty authority. But all that this amounts to is that a lottery is a game inasmuch as an apparatus (usually a barrel) containing numbers corresponding to the tickets purchased by the share-holders is used for drawing and the drawers are players who are on the same footing as persons drawing from a pack of cards to see who gets the highest or lowest card. But we may accept this dictum without in any way impugning the facts of this case.

So it was held in *Tollett* v. *Thomas* (2), that a "*Pari mutuel*" machine for registering bets is an instrument of gaming, but it has never been held that a betting book or a notice in the newspapers giving the odds are instruments of gaming though it has been held under a special Statute which has no application to India that boards showing the odds at race courses are instruments of gaming. Now what are the facts here? People are invited to bet on the odds offered by the defendant, who is *pro tanto* a bookmaker, on certain figures. They can choose any figure from 1 to 10 or any combination of figures and they can

(1) (1869) 12 W. R. Cr. 34.

(2) (1871) 6 Q. B. 514.

wager any sum from 2 annas up to Rs. 10, receiving a voucher in return on which is entered in one column the amount they have paid and in an opposite column the amount they will win if the result of the quotations for the day divided by 5 ends in the figure they have selected. Exhibit 2 is one of these voucher books and in the examples we have seen as much as 40 to 1 is given by the bookmaker and the system seems perfectly open and above board. Five quotations appear to be received daily, two from New York and two from some other American market, and there is one quotation which is known as "spot," but this is immaterial as they are all of a similar character. At twelve o'clock daily the result of the addition of these five quotations divided by 5 is posted on a board and those who have betted on the winning digit get the sum marked on their voucher. The odds given are so liberal that at first sight it would appear a very advantageous business for the bettors, but it is alleged in Exhibit 15, an extract from the *Empire* newspaper dated 17th February 1912, that wholesale cheating goes on in this respect, the winning number being surreptitiously changed if too much money has been laid on it.

How far these allegations are true we are unable to say, but the allegations as well as the article in which they are exhibited are wholly irrelevant for the purposes of this case.

What is charged in the newspaper is cheating and there is no charge of cheating before us, and it has been held on the highest authority in England and India, the Judicial Committee of the Privy Council in the case of *Ram Lall Thakoorseydas* v. *Soojunmull Dhanumall* (1), that the question, whether frauds might be committed or attempted from the

(1) (1848) 4 Moo I. A. 339

1912

RAM PRATAP NEMANI v. EMPEROR.

desire of gain in such speculations, was irrelevant if the wager in question is not in itself illegal and that it was for the Legislative Council in Calcutta to consider how far it may be conducive to the benefit of our Indian Empire to legislate on English line against such wagers.

The judgment was pronounced by Lord Campbell in February 1848, and appears to have been speedily followed by the enactment of Act XXI of 1848, entitled an Act for avoiding wagers, which was passed by the Governor-General in Council on the 10th October 1848.

This Act opens with the words "Whereas it is expedient to discourage gaming and wagering for money," thus making a clear distinction between the two and it proceeds to make all agreements by way of gaming or wagering null and void. Its only other section abolishes the trial of issues on feigned wagers for ascertaining any disputed facts.

Having clearly recognised this distinction the Legislature in India has made gaming in public places penal and has intentionally, we must presume, refrained from passing any penal legislation against wagering or betting.

Finding that the system pursued in this cotton-gambling appeared to be pure betting we at an early stage of the hearing asked learned Standing Counsel to have produced before us the exhibits to which roman figures are attached which were alleged by him to be instruments of gaming. It was his first contention that the house was an instrument of gaming, but this proposition carries its own refutation on the face of it. The house is the place which is alleged to be a common gaming house and it has to be proved that (i) instruments of gaming were supplied for money or money's worth in that place, and (ii)

that that place is a public place: now the alleged instruments of gaming are Exhibits I to IX and they may be briefly described as follows:—

Exhibit I.—A tin board hung up in the room containing the day's cotton figures. This is no more an instrument of gaming than the original telegram or an extract from a newspaper would be.

Exhibit II.—A similar wooden board hung up outside the premises in the open street and not challenged by the Police authorities for several months.

Exhibit III—Is a canvas signboard showing the name of the firm.

Exhibit IV—Is a board showing the odds on a series of figures.

Exhibit V—Is a small board for writing the figure of the day. When seized this had on it $\frac{1079}{2}$.

Exhibit VI—Is a small tin ticket with 9 the winning digit on it.

Exhibit VII—Is the board giving the odds on place betting.

Exhibit VIII—Is a board giving the odds on mixed double and triple events.

Exhibit IX.—A box containing Rs. 410.

Every one of these things is exactly what may be found on the stall of any bookmaker at the races and though such boards may have been declared illegal in England they have certainly not been made penal by any Statute in force in Calcutta. What the effect of the introduction of the word "wagering" into the Bombay Act may be it is not for us to enquire.

They are mere evidence of gambling and are on exactly the same footing as the books and papers used for recording the bets.

In the case of rain-gambling these have been specially made instruments of gaming by the Legislature

1912

RAM PRATAP NEMANI v. EMPEROR.

in Act III (B. C.) of 1897, and it is therefore clear that they are excluded from the operation of the Police Act in the case of cotton-gambling. To sum up therefore we find that this cotton-gambling is not a lottery, it is not a game or contest and it is not a form of gambling in which instruments of gaming are kept or used for the profit or gain of the person owning or using the place.

It is betting pure and simple, and if it gives rise to all the evils which are ascribed to it by the learned Magistrate, in his very thoughtful judgment, it is as Lord Campbell said, for the Legislature to consider what measures should be taken to put a stop to it. Under the law as at present constituted we are unable to find that any offence has been committed within the meaning of section 44, Act IV of 1866, as amended by Act III (B. C.) of 1897, and we accordingly make the rule absolute, set aside the conviction and sentence and direct that the petitioner be acquitted and released.

This judgment will govern Rule No. 637 which was issued on the same grounds.

S. K. B.

Rule absolute.

PRIVY COUNCIL.

HAJI BUKSH ELAHI

v.

DURLAV CHANDRA KAR,

(AND ANOTHER APPEAL CONSOLIDATED).

*P.C.** 1912

May 10, 14; *June* 13.

[ON APPEAL FROM THE HIGH COURT AT FORT WILLIAM IN BENGAL.]

Sale for arrears of revenue—Act XI of 1859, ss. 2 and 3—Bengal Act VII of 1868—Government Tenures in mahal Panchannagram in the 24-Pergunnahs—Kabuliyat fixing date for payment of revenue in every year—Sale for arrears when no arrears were due—Variation of contract of parties by general considerations or administrative rules, not permissible.

S. 2 of Act XI of 1859 enacts that "if the whole or a portion of a kist or instalment of any month of the era according to which the settlement and kistbandi of any mahal have been regulated be unpaid on the 1st of the following month of such era, the sum so remaining unpaid shall be considered as an arrear of revenue." S. 3 provides that the "Board of Revenue at Calcutta shall determine upon what dates all arrears of revenue shall be paid up in each district under their jurisdiction, in default of which payment estates in arrear shall be sold"; and a notification duly published in compliance with that section on 6th October 1871 "fixed the 28th June of each respective year as the latest date of payment of the rents of all descriptions of tenures in khas mahal Panchannagram, in default of which payment on or previous to that date tenures in arrears in that mahal will be sold." The appellant was the holder of a Government tenure in Dihi Panchannagram, to which, by virtue of Bengal Act VII of 1868, Act XI of 1859 was applicable; and the kabuliyat under which he held stipulated for "payment of the whole jumma in the Collectorate within 28th June every year." The revenue remaining unpaid on 28th June 1902, the tenure was, after the preliminary procedure prescribed by the Acts, sold for arrears of revenue on 16th March 1903, and purchased by the respondent.

Held (reversing the decision of the High Court), that on the construction of the Acts and the above notification, the revenue was not in arrear

**Present:* LORD SHAW, SIR JOHN EDGE AND MR. AMEER ALI.

1912

HAJI BUKSH ELAHI v. DURLAV CHANDRA KAR.

until 1st July 1902, and the date fixed as that on which the tenure could be sold in default of payment of the arrears was 28th June 1903. There were, therefore, at the date of the sale no arrears of revenue, and in accordance with the decision in *Balkishen Das* v. *Simpson* (1) the sale was consequently invalid.

No variation of the contract of parties and the statutory provisions applicable thereto is possible by reason of general considerations or administrative rules which have not the sanction of Indian statute.

Two consolidated appeals from two judgments and two decrees (18th February and 6th and 25th March 1908, respectively,) of the High Court at Calcutta which set aside a judgment and two decrees (25th July 1905) of the Court of the Subordinate Judge of the 24-Pergunnahs.

Haji Buksh Elahi, the plaintiff in the first suit and defendant in the other, was the appellant in both appeals to His Majesty in Council.

The appeals arose out of two suits in respect of two holdings 142 and 143 within an estate known as khas mahal Panchannagram on the Revenue Roll of the Collectorate of the 24-Pergunnahs. These holdings were sold for arrears of revenue alleged to be due in respect of them, and were purchased by the respondent, Durlav Chandra Kar, on 16th March 1903. The first suit, No. 17 of 1904, was brought by the appellant to set aside the sale, and the second suit, No. 46 of 1904, was brought by the respondent as the purchaser at the revenue sale for possession of the two holdings.

The material facts were that the Government published in the *Calcutta Gazette* of 11th October 1871, a notice, dated 6th October of that year, in the following terms :—

"Notice is hereby given that under the provisions of section 3, Act XI of 1859, the Board of Revenue at Calcutta has determined and fixed 28th June of each

(1) (1898) I. L. R. 25 Calc. 833 : L. R. 25 I. A. 151.

respective year as the latest date of payment of the rents of all description of tenures in khas mahal Panchannagram, in default of which payment on or previous to that date tenures in arrears in that mahal will be sold at public auction to the highest bidder under the provisions of Bengal Act VII of 1868."

On 18th February 1874, one Bhagaban Chandra Banerji who was then the tenure-holder of the two plots of land 142 and 143, executed separate kabuliyats in favour of the Government agreeing to the jumma, respectively, fixed on each of the two plots, and undertaking to pay it "within the 28th June every year."

On 27th March 1902, the appellant purchased the two holdings from the representatives of Bhagaban Chandra Banerji (then deceased) for Rs. 16,000: and the appellant alleged that after the purchase he, by his agent, tendered on or before 1st January 1902 the revenue due on the two plots, but his tender was refused on the ground that there was an order of the Collector not to accept rent from unregistered proprietors.

On 29th April 1902, the appellant applied to the Collector for registration of his name as proprietor of the two holdings in place of Bhagaban Chandra Banerji: his name, however, was only registered in respect of plot 142 on 15th December 1902, and in respect of plot 143 in July 1903. The appellant alleged that he also applied for redemption of the holdings on payment of the proper fees.

On 9th February 1903, the Government revenue being unpaid, proceedings were taken in the office of the Collector of the 24-Pergunnahs for the recovery of the amounts due, and notices were issued to the Nazir to notify the sales of the two holdings for the 16th March 1903 under section 6 of Act XI of 1859; and on 19th February proclamations were issued

1912

HAJI BUKSH ELAHI v. DURLAV CHANDRA KAR.

under section 7 of Act XI of 1859 forbidding raiyats to pay rent after 28th June 1902 to the defaulting proprietor and they were duly served on 28th February 1903.

On 16th March 1903, the two holdings were put up for sale on account of the non-payment of Government revenue for the June instalment of 1902, and were sold to the respondent for Rs. 3,320. On the 19th March the sales were confirmed under section 27, Act XI of 1859 ; and on 22nd June certificates of sale were granted to the respondent by the Collector under section 28.

On 24th June 1903, the appellant's agent went to deposit a redemption fee required by the Collector, and on that date the appellant alleged that he came to know, for the first time, that the two holdings had been sold for default in payment of the Government revenue. On 3rd July the appellant appealed to the Commissioner of Revenue under section 2 of Bengal Act VII of 1868, against the sales, but his appeals were dismissed as being out of time ; an application for review of the order was dismissed on 18th August 1903, and an appeal to the Board of Revenue was dismissed on 16th September 1903. Notwithstanding that formal delivery of possession of the holdings was made to the respondent, the appellant remained in actual possession, and the suits above mentioned were brought by the appellant and respondent on 10th February and 8th April 1904, respectively.

The appellant in his plaint stated that as he was not a recorded-holder of the tenures no rent could, according to official practice, be paid by or received from him ; that he had not come to know of the sales until 24th June 1903 ; that no notification thereof had been made or served on him ; that the respondent and defendant No. 2 (one Saday Krishna Bose,

against whom the suit was dismissed) had acted in collusion and fraudulently suppressed the notifications, and had kept the appellant in ignorance of the intended sale; that holding 143 was lakheraj (rent-free) and, therefore, the sale was without jurisdiction; that the sales were irregular, illegal, and brought about by fraud, and he prayed that they should be annulled and cancelled, or, in the alternative, for Rs. 11,000 as damages.

The respondent denied the appellant's charges of fraud, and his allegations of fact. He contended that the certificates of the sales were conclusive evidence of the serving and posting of all notifications; that the Court had no jurisdiction to cancel or annul the sales inasmuch as the appellant had not filed a valid appeal to the Commissioner of Revenue, and as he had not in his informal appeal specified the ground alleged in his suit as reasons for setting the sales aside. He denied that the holding 143 was lakheraj, and asked that the suit should be dismissed with costs.

The two suits were heard together.

The Subordidate Judge held, *inter alia*, that the rents of the holdings were not paid on due date, and were not tendered as alleged by the appellant; that the notices had been duly served, and had not been suppressed as alleged; that no portion of the holdings was lakheraj; that the sales were not brought about by any fraud on the part of the defendants; that the notices of sale having stated that Bhagaban Chandra Banerji was the recorded proprietor was an irregularity, but no loss had been caused thereby; and that the sales however were invalid in law, inasmuch as at the date thereof the latest date for the payment of the arrears of revenue due in respect of the two holdings had not arrived.

1912

HAJI BUKSH ELAHI v. DURLAV CHANDRA KAR.

His judgment, so far as material, was as follows :—

"The most important question in these cases is whether under the provisions of sections 2 and 3 of Act XI of 1859 the sales in question are valid. Now, it is not disputed that Panchannagram tenures came under Act XI of 1859 by the provisions of Bengal Act VII of 1868.

Section 2 of Act XI of 1859 defines an arrear of revenue. It states that, if the whole or a portion of a kist or instalment of any month of the era according to which the settlement and kistbandi of any mahal have been regulated be unpaid on the 1st of the following month of such era, the sum so remaining unpaid shall be considered as an arrear of revenue. Now here, as I have stated above, Bhagaban Banerji's kabuliyats show that he bound himself to pay his rents on the 28th June of every year in one kist. So under section 2, the rent for 1902 was not in arrear till the 1st of July of that year.

"Now, the Board of Revenue are required under section 3 of the Act to determine on what dates *arrears of revenue* shall be paid up, in default of which payment the estates in arrears shall be sold at public auction."

After referring to the notification of 6th October 1871, the judgment continued :—

"I think this notification of the Board of Revenue purporting to have been done under section 3 of Act XI, is not strictly in accordance with the law. Under section 3 the Board can fix the dates for payment of *arrears* of revenue, in default of which payment the estate in arrear shall be sold. But I think it cannot fix the date of payment of *revenue* in default of which payment the estate is liable to be sold.

"Now an estate is not in arrear till the first of the month next succeeding to that when the rent is payable. In the present case the rent for 1902 was payable on the 28th of June and the tenure could not be said to be in arrear before the first of July 1902. The Board's notification fixed the 28th of June for payment of rent, in default of which payment the tenure would be sold. So in the present case the tenures could not be sold till the 28th of June 1903, there being only one date fixed in the year for payment of rent. See the observations of the learned Judges in the case of *Harkhoo Singh* v *Bunsidhur Singh* (1). There was, therefore, no arrear due for June 1902 or Ashar 1309. And the sales held, I think, were held without jurisdiction. See the case above cited and also the case of *Balkishen Das* v. *Simpson* (2) decided by the Privy Council.

"But it is urged that the Haji did not take this objection in his appeal before the Commissioner and that the appeal filed before the Commissioner

(1) (1898) I. L. R. 25 Calc. 876, 877, 878.

(2) (1898) I.L.R. 25 Calc. 833, 842 : L. R. 25 I. A. 151, 158

was no appeal at all as it was filed after the period of limitation for presentation of such appeals had expired. In support of this contention *Gobind Lal Roy* v. *Ramjanam Misser* (1) is cited. But that was a case of a sale held on account of default in payment of arrears of revenue as explained in *Harkhoo Singh* v. *Bunsidhur Singh* at page 880. But, as in the last mentioned case, here in the present instance there were no arrears and there were, therefore, no sales for arrears of revenue. I, therefore, hold, as held in the two cases cited above, that it was not necessary in the present instance for the Haji to appeal to the Commissioner.

"I hold that the sales in question were invalid in law and should be set aside."

The appellant's suit was accordingly decreed, and the respondent's suit dismissed.

The respondent preferred appeals in both suits against the decisions of the Subordinate Judge, and the appeals were heard by a Divisional Bench of the High Court (HARINGTON and HOLMWOOD JJ.) who reversed the decision of the Subordinate Judge and decreed both appeals.

After referring to the reasoning of the Subordinate Judge, the High Court in their judgment said:—

"The argument is ingenious but in our view it is not sound.

"The settlement is made on February 18th. Therefore, in case of an ordinary contract of lease the annual jumma would be payable on February 18th in each successive year: but under Rule 7 of Part III, Chapter XVI of the Survey and Settlement Manual, a settlement of revenue should ordinarily take effect from the beginning of the financial year next after that in which the proceedings of the settlement officer have been completed. If that rule be applied, the settlement dates from April the 1st, 1874 and the jumma would ordinarily be payable on April 1st each year.

"If it were ordinarily payable on April 1st each year, then the latest day of payment under the Board's Proclamation of 1871 is June 28th.

"In our opinion the undertaking in the kabuliyat does not have the effect of extending the time for the payment of the revenue but is nothing more than a promise by the tenant that he will pay the revenue ordinarily payable on the first day of the financial year by the latest day of payment as fixed by the Board's Proclamation.

(1) (1893) I. L. R. 21 Calc. 70 : L. R. 20 I. A. 165.

1912

HAJI BUKSH ELAHI v. DURLAV CHANDRA KAR.

"Section 2 of the Act of 1859 is clearly applicable to monthly instalments and in revenue-paying estates and does not apply to a yearly jumma of tenures such as the one now under consideration.

"The revenue, therefore, being unpaid after June 28th, the Collector was empowered under section 11 of Bengal Act, VII of 1868, to sell up the holding."

The respondent's suit was accordingly decreed and the appellant's suit was dismissed.

On these appeals,

Sir R. Finlay, K. C., and *Ross*, for the appellant, contended that there were no arrears of revenue due at the time of sale, and the view taken by the Subordinate Judge was, it was submitted, the correct one, that the sale had taken place before the latest day for payment had arrived, and therefore there could not have been any revenue then in arrear. Reference was made to Act XI of 1859, sections 2 and 3; Bengal Act VII of 1868, section 11; *Harkhoo Singh* v. *Bunsidhur Singh* (1), The notification of the Revenue Board, dated 6th October 1871, was illegal, invalid and *ultra vires*, and the Collector had no jurisdiction to sell the holdings in dispute under the provisions of Act XI of 1859: *Balkishen Das* v. *Simpson* (2). Rule 7, Part III, Chapter XVI of the Survey and Settlement Manual had no application to the question in issue in the present case. The undertaking in the kabuliyat had been wrongly interpreted by the High Court: the effect of it, it was submitted, was to extend the time for the payment of the revenue. When the revenue has not been paid on the fixed day, a further day had to be fixed, and if it is not paid on the latter day, then it is an arrear for the purposes of sale. As held by the Subordinate Judge, the Revenue Board

(1) (1898) I. L. R. 25 Calc. 876. (2) (1898) I. L. R. 25 Calc. 833, 842: L. R. 25 I. A. 151, 158.

could not fix the date of payment of revenue in default of which payment the holding was liable to be sold: it could only under section 3 of Act XI of 1859 fix the date for payment of arrears of revenue in default of which payment the holding in arrears shall be sold.

De Gruyther, K. C., and *Kenworthy Brown*, for the respondent, contended that on the true construction of Act XI of 1859 and Bengal Act VII of 1868, the sales of the holdings were valid, and could not now be annulled or cancelled. At the date of sale there were arrears of revenue for which the Collector was empowered to sell the holdings under section 11 of Bengal Act VII of 1868, with which sections 2 and 3 of Act XI of 1859 had no connection. There was a difference in what constituted "arrears" of revenue under the two Acts, and in the procedure under them. Both Courts in India held that the procedure preliminary to the sale was correct and in accordance with that prescribed for sale in such cases. Reference was made to Bengal Act VII of 1868, section 1, definitions of "Revenue," "Proprietor" and "Tenure"; Act X of 1859, section 20: and Bengal Tenancy Act (VIII of 1885), sections 53, 54 and 101 as to the "day fixed for payment of rent"; *Harkhoo Singh* v. *Bunsidhur Singh* (1); *Mahomed Jan* v. *Ganga Bishun Singh* (2); Act XI of 1859, sections 6 and 19: and Rule 7, Part III of Chapter XVI of the Survey and Settlement Manual.

Ross replied referring to Bengal Act VII of 1868, sections 3 and 30. Sections 2 and 3 of Act XI of 1859 are to be read together with section 11 of Bengal Act VII of 1868. The distinction drawn between the two Acts could not be maintained.

(1) (1898) I. L. R. 25 Calc. 876.

(2) (1911) I. L. R. 38 Calc. 537: L. R. 38 I. A. 80.

1912

HAJI BUKSH ELAHI v. DURLAV CHANDRA KAR.

June 13.

The judgment of their Lordships was delivered by

LORD SHAW. These are consolidated appeals from judgments and decrees of the High Court at Calcutta, which set aside two decrees of the Subordinate Judge in the Second Court of the 24-Pergunnahs in Bengal. The question for determination by the Board is whether a certain sale of holdings for arrears of revenue made to the respondent on the 16th March 1903, should be set aside.

On the 27th March 1902, the appellant purchased these holdings for Rs. 16,000 from a son of Bhagaban Chandra Banerji. By the kabuliyat executed in the year 1874 by Bhagaban, who was thus the appellant's predecessor in title, it was stipulated as follows:—"I shall pay the said jumma in the collectorate within the 28th day of June every year." The holdings were Government tenures in Dihi Panchannagram in the district of the 24-Pergunnahs, and it is not disputed that such tenures came under the Act XI of 1859 by virtue of the provisions of Act VII of 1868. By section 2 of the former Act an arrear of revenue was described thus:—

"If the whole or a portion of a kist or instalment of any month of the era, according to which the settlement and kistbundi of any mahal have been regulated, be unpaid on the first of the following month of such era, the sum so remaining unpaid shall be considered as an arrear of revenue."

It seems accordingly hardly to admit of dispute that, if this section applied, the rent payable under the kabuliyat on the 28th June 1902 was not in arrear till the 1st of July thereafter.

Statute having thus made clear what was to be considered an arrear of revenue, and at what date a past due payment was to be "considered as an arrear of revenue," namely, on the first of the month following that in which the payment fell due, the further question is this, viz.:—Was this sale conducted in

accordance with the procedure prescribed by Statute for the sales of property in respect of unpaid arrears of revenue?

While, as stated, it was admitted that these tenures were brought under the Act of 1859 by the Statute of 1868, it was nevertheless contended that there was some distinction to be made with reference to procedure and with reference to what constituted 'arrears." The contention is important and was ably presented, but, in their Lordships' opinion, it is without foundation. The Act of 1868 above referred to extends the word "revenue" so as to include "every sum annually paid to Government by the proprietor of any estate or tenure in respect thereof." As to the attempt to differentiate procedure under the two Statutes, the answer to that seems sufficiently contained in section 30 of the later Act, which provides that it shall be read with, and taken as part of, the former. The date when a past due payment was to be considered arrears having accordingly been settled by section 2 of the Act of 1859, as quoted, their Lordships cannot agree with the judgment of the High Court, which introduces a reference to "the settlement" having been made on 18th February. Therefore, say the learned Judges:—

"In the case of an ordinary contract of lease, the annual jumma would be payable on 18th February in each successive year; but under Rule 7 of Part III, c. 16, of the Survey and Settlement Manual, a settlement of revenue should ordinarily take effect from the beginning of the financial year next after that in which the proceedings of the settlement officer have been completed. If that rule be applied, the settlement dates from 1st April 1874, and the jumma would ordinarily be payable on 1st April each year.

The statements and considerations here given do not appear to their Lordships to bear upon the present case. Whatever might be the ordinary date of payment, or secondly, whatever might be the date when

1912

HAJI BUKSH ELAHI v. DURLAV CHANDRA KAR.

"the settlement" is made, or thirdly, whatever be the provisions of the Survey and Settlement Manual, it does not appear to their Lordships legitimate, by reason of any one or all of these things, to vary the actual date of payment in the kabuliyat in the present case, which is the 28th June, or the actual date when a past due payment should be considered as an arrear, which is by the Statute of 1859 the 1st July 1902. No variation of the contract of parties and the statutory provisions applicable thereto is possible by reason of general considerations or administrative rules which have not the sanction of Indian Statute. In the words of Lord Watson, in *Balkishen Das* v. *Simpson* (1) referring to the Act of 1859:—

> "The Act does not sanction, and by plain implication forbids, the sale of any estate which is not at the time in arrear of Government revenue. The whole clauses of the Act of 1859, in so far as these relate to sales or to their challenge at the instance of the proprietor, as well as the provisions of section 2 of Bengal Act VII of 1868, are framed upon the express footing that they are to be applicable to the sale of estates which are in arrear of duty."

The date when by Statute accordingly this revenue was considered in arrear was the 1st July 1902. At what date was default made in paying that arrear of revenue, so as to entitle a sale of the estate to be made? This, which appears to their Lordships to be the real question in the case, is clearly answered by the Act of 1859 itself and by the notification which followed thereon. By section 3 of the Act, "The Board of Revenue at Calcutta shall determine upon what dates all arrears of revenue, and all demands which by the Regulations and Acts in force are directed to be realised in the same manner as arrears of revenue, shall be paid up in each district under their jurisdiction, in default of which payment

(1) (1898) I. L. R. 25 Calc. 833, 842: L. R. 25 I. A. 151, 158.

the estates in arrear in those districts, except as hereinafter provided, shall be sold at public auction to the highest bidder." In compliance with this section, the Board of Revenue on the 6th October 1871 made and duly published a notification that it—

"has determined and fixed the 28th June of each respective year as the latest date of payment of the rents of all description of tenures in khas mahal Panchannagram, in default of which payment on or previous to that date, tenures in arrears in that mahal will be sold at public auction to the highest bidder."

Bearing in mind that the whole provisions with regard to sales are, in the language of Lord Watson, "framed upon the express footing that they are to be applicable to the sale of estates which are in arrear of duty," and that this tenure could not be considered in arrear until the 1st July 1902, it appears fairly clear that the 28th June 1903, is the first date under the Proclamation and the Statute when there has arisen such a default as would enable that "tenure in arrears" to be sold. It so happens that the payment in the present case is not a monthly, but an annual payment, and it further happens that the payment fell to be made on the 28th June 1902. The Statute having by plain implication forbidden the estate to be considered in arrear until the 1st July, it appears to follow that the date fixed as that on which tenures in arrear will be sold must be the succeeding 28th June, namely, in the year 1903. This estate, however, was sold in the previous month of March, and their Lordships agree with the view of the Subordinate Judge in thinking that the sale is accordingly invalid. In the language of the learned Judge—

"The Board of Revenue are required, under section 3 of the Act, to determine on what date *arrears of revenue* shall be paid up, in default of which payment the estates in arrear shall be sold at public auction."

Their Lordships agree with the view that the notification must, having regard to this section of the

1912

HAJI BUKSH ELAHI v. DURLAV CHANDRA KAR.

Statute which authorised it, be applied to the present estate as fixing the 28th June 1903 as the date on which, if the arrears are not paid up, the estate can be sold. If, in cases such as the present, this holds up the power of sale until nearly a year's revenue stands in arrear, that matter, including the question whether more than one date for payment of arrears should be set up as periods of default, is one for the consideration of the Legislature and the Board of Revenue.

Their Lordships will humbly advise His Majesty that the appeals should be allowed, the judgments and decrees of the High Court reversed, and those of the Subordinate Judge restored, the costs of the suit and of the appeal being borne by the respondent.

Appeal allowed.

Solicitors for the appellant: *W. W. Box & Co.*

Solicitor for the respondent: *The Solicitor, India-Office.*

J. V. W.

APPELLATE CIVIL.

Before Mr. Justice Mookerjee and Mr. Justice Carnduff.

CHALHO SINGH

v.

JHARO SINGH.*

1911

May 30.

Teishkhana paper—Evidence—Official record—Road-cess returns—Bengal Cess Act (IX of 1880), s. 95—Road-cess return filed by a co-sharer landlord and assessment made on the basis of it—Whether such return is admissible in evidence against the other co-sharers.

Teishkhana paper is a register kept for the information of the Collector, but it is in no sense an official record; therefore, before a *teishkhana* paper could be used in evidence, it must be proved that it had been kept in due course by the registered patwari.

Baijnath Singh v. *Sukhu Mahton* (1) and *Samar Dasadh* v. *Juggul Kishore Singh* (2) distinguished.

Persons interested to the extent of an one-fourth share of the superior interest filed a road-cess return under the provisions of the Bengal Cess Act, and they stated therein, as they were bound to do under the law, the names of the tenants in occupation of specific lands. The statement which they made was against their interest. No similar return was filed by the persons who represented the remaining three-fourths share of the superior interest, and the Revenue authorities assessed the road cess, as they were entitled to do, upon the return filed by the one-fourth shareholders:

Held, that the return filed by the one-fourth shareholders is admissible in evidence as against the remaining shareholders of the superior interest.

Nusseerun v. *Gouree Sunkur Singh* (3) distinguished.

S. 95 of the Bengal Cess Act (IX of 1880) is not exhaustive. It was intended to restrict the operation of s. 21 of the Evidence Act, and a road-cess return may be admissible in evidence as against persons other than the one who has made the return.

* Appeal from Appellate Decree, No. 2057 of 1909, against the decree of S. S. Skinner, District Judge of Gaya, dated Aug. 24, 1909, reversing the decree of Jadu Nandan Pershad, Munsif of Gaya, dated March 22, 1909.

(1) (1891) I. L. R. 18 Calc. 534. (2) (1895) I. L. R. 23 Calc. 366.
(3) (1874) 22. W. R. 192.

1911

CHALHO SINGH v. JHARO SINGH.

SECOND APPEAL by the plaintiffs, Chalho Singh and others.

This appeal arose out of an action brought by the plaintiffs to recover possession of 17 bighas of land on declaration of their title thereto. The plaintiffs alleged that they had been in peaceful possession of these 17 bighas as their *nakdi kasht* in the four anna *takhta* of mouzah Sripat Ratan Khap, for more than 20 years; that on the 23rd June 1908, the defendants Nos. 1 to 4, who were also proprietors of the said *takhta*, claimed four bighas out of the holding for their cultivation, and in consequence thereof there were criminal cases between the parties, and the result was that the plaintiffs were dispossessed of the entire 17 bighas of their *kasht* land. The plaintiffs further alleged that they had acquired right of occupancy in the disputed land.

The defendants pleaded, *inter alia*, that the plaintiffs never held the 17 bighas of *kasht* in the four anna *takhta* of the mouzah and that they had not acquired any right of occupancy therein; that all the lands comprised in the *takhta*, with the exception of four bighas only, were *khudkasht* lands of the proprietors who were in possession thereof according to their shares.

In support of their claim the plaintiffs filed, amongst other documents, *teishkhana* papers and a road-cess return. The Court of first instance held that both the *teishkhana* papers and the road-cess return were admissible in evidence, and decreed the plaintiffs' suit. On appeal, the learned District Judge reversed the decision of the first Court.

Against this decision the plaintiffs appealed to the High Court.

Babu Mahendra Nath Roy (with him *Babu Kulwant Sahay*), for the appellants. The learned

1911

CHALHO SINGH v. JHARO SINGH.

Judge of the Court below was wrong in holding that the *teishkhana* papers filed by the plaintiffs were not admissible in evidence. It is admissible: see *Samar Dasadh* v. *Juggul Kishore Singh* (1) and *Baijnath Singh* v. *Sukhu Mahton* (2). The road-cess return also was admissible in evidence. It was filed by a co-sharer landlord, and in it the names of the tenants in occupation of specific lands were stated; the other co-sharers did not file any other return and so assessment was made on the basis of it. That being so, the return is admissible in evidence against the other co-sharers. The provisions of s. 95 of the Bengal Cess Act are not exhaustive. The effect of it is only to qualify s. 21 of the Evidence Act. The Privy Council, in the case of *Hem Chandra Chowdhry* v. *Kali Prosanna Bhaduri* (3), held that a road-cess return is admissible in evidence against any person other than the maker thereof.

Babu Umakali Mookerjee (with him *Babu Sarat Chander Ghose*), for the respondents. The Court below was right in holding that the *teishkhana* papers were not admissible in evidence. It is not an official record at all. The learned Judge found that the man who filed the papers was not the registered patwari. Only in case where it is found that the registered patwari filed the *teishkhana* papers and they had been kept in due course by him, they might be admissible in evidence. In this respect the case of *Samar Dasadh* v. *Juggul Kishore Singh* (1) and the other case cited by the appellant are distinguishable. As regards the road-cess return it is submitted that it is also not admissible in evidence. Under s. 95 of the Bengal Cess Act, a road-cess return is admissible in evidence only against the person who filed it. That being so, it was

(1) (1895) I. L. R. 23 Calc. 366.
(2) (1891) I. L. R. 18 Calc. 534.
(3) (1903) I. L. R. 30 Calc. 1033; L. R. 30, I. A. 177.

1911

CHALHO SINGH v. JHARO SINGH.

not admissible in evidence against the respondents, and the learned Judge was right in so holding. *Nusseerun* v. *Gouree Sunkur Singh* (1) supports my contention.

MOOKERJEE AND CARNDUFF JJ. The subject matter of the litigation which has given rise to this appeal is a tract of 17 bighas of land in mouzah Sripat Ratankhap of which the plaintiffs-appellants seek to recover possession on the ground that it formed their *nagdi kasht* land. The defendants denied that the land in dispute was the *nagdi kasht* of the plaintiffs. The Court of first instance decreed the suit. Upon appeal the District Judge has reversed that decision.

The plaintiffs have now appealed to this Court. On their behalf the decision of the District Judge has been challenged on the ground that he has excluded from consideration two pieces of documentary evidence which are admissible in evidence and had been rightly admitted as such by the Court of first instance. The documents in question are certain *teishkhana* papers and a road-cess return.

In so far as the first document is concerned, it has been contended that it is admissible in evidence upon the authority of the decision of this Court in the cases of *Baijnath Singh* v. *Sukhu Mahton* (2) and *Samar Dasadh* v. *Jugqul Kishore Singh* (3). In our opinion, the cases upon which reliance is placed are clearly distinguishable and are of no assistance to the appellants. They merely lay down that a *teishkhana* register prepared by a *patwari* under rules framed by the Board of Revenue under Regulation XII of 1817, though not a public document, is admissible in evidence if properly proved. In fact,

(1) (1874) 22 W. R. 192.
(2) (1891) I. L. R. 18 Calc. 534.
(3) (1895) I. L. R. 23 Calc. 366.

the *teishkhana* paper is a document prepared in the office of the zemindar by a *patwari* who is paid by the zemindar but approved by the Collector. It is a register kept for the information of the Collector, but it is in no sense an official record. In the case before us, it was disputed on behalf of the defendants that the person who is said to have kept the *teishkhana* paper was a *patwari* approved by the Collector. It was therefore obligatory upon the plaintiffs, before the *teishkhana* paper could be used in evidence, to prove that it had been kept in due course by the registered *patwari*. They did not, however, examine Sukhi Lal, the alleged *patwari*; and the District Judge very properly says that their failure to call this witness shows that it cannot be treated as evidence. In our opinion, the District Judge has not treated the *teishkhana* paper as inadmissible in evidence. He has rejected it on the ground that it had not been proved to be kept by a registered *patwari*. This is obviously a valid ground why no reliance should be placed on it.

In so far as the second document is concerned, namely, the road-cess paper, it appears to have been filed on the 18th June, 1903, by the proprietors interested to the extent of an one-fourth share in the property. It was a return filed for the years 1306 to 1308; and, so far as we can gather, on the basis thereof cesses were assessed not merely in respect of the shares of the proprietors who made the return but in respect of the whole property. The learned vakil for the defendants-respondents has contended that the road cess return is admissible in evidence only as against the persons who made the return, and that it is not admissible in evidence as against a stranger. In support of this view, he has placed reliance upon s. 95 of the Bengal Cess Act of

1911

CHALHO SINGH v. JHARO SINGH.

1880) and upon the decision of this Court in the case of *Nusseerun* v. *Gouree Sunkur Singh* (1). Now section 95 of the Cess Act provides that "every return filed by, or on behalf of, any person in pursuance of the provisions of this part shall bear the signature and address of such person or his authorised agent, and shall be admissible in evidence against such person, but shall not be admissible in his favour." In our opinion, s. 95 on which reliance is placed is not exhaustive. It was intended to restrict the operation of s. 21 of the Indian Evidence Act which makes an admission ordinarily proveable as against the person who makes it or his representative in interest, but lays down certain exceptional cases in which admissions may be proved by or on behalf of the person who has made them or his representative in interest. The effect of s. 95 is to qualify s. 21 of the Indian Evidence Act to this extent that a road cess return cannot, under any circumstance, be admitted in evidence in favour of the person who has made the return. Section 95, however, does not lay down, expressly or by implication, that a road-cess return is not admissible in evidence against any person other than the maker thereof. In fact, such a view is contrary to the decision of the Judicial Committee in the case of *Hem Chandra Chowdhry* v. *Kali Prasanna Bhaduri* (2). In that case, certain road-cess returns were filed and were sought to be used as evidence against a person other than those who had made the returns. The Subordinate Judge treated the returns as admissible in evidence. Upon appeal, this Court observed as follows: "The road-cess returns are exhibits 1 to 4 and 6 and 7. None of these were submitted by the

(1) (1874) 22 W. R. 192.

(2) (1903) I. L. R. 30 Calc. 1033; L. R. 30 I. A. 177

appellants, and exhibits 3, 4, 6 and 7 relate not to the tenancy under either of the plaintiff's estates, but to the tenancy under estate No. 122, which represents the 10 annas share of the perganah, and are, we consider, on that ground inadmissible. We cannot hold that there is a separate and distinct tenancy under the plaintiff as proprietor of one estate so as to admit of his enhancing the rent payable to him, and at the same time hold that there is one and the same tenancy under him and the proprietors of estate No. 122, so as to make a statement relating to the tenancy under the latter estate admissible. If the tenancies are distinct, the statement to be admissible must, we think, relate to the tenancy which is in question. In this view, all but exhibits 1 and 2 must be excluded." Upon appeal to the Judicial Committee, their Lordships held that the road cess returns were admissible in evidence, not merely as against the persons who made the returns but also as against other persons. No doubt, the purpose for which the returns were used in that litigation is not identical with the purpose for which the return is sought to be used in the case before us. But the decision of the Judicial Committee is an authority for the proposition that s. 95 of the Bengal Cess Act, 1880 is not exhaustive and that a road-cess return may be admissible in evidence as against persons other than the one who has made the return. The question, therefore, that arises in the case before us is, whether the road-cess return is admissible as against the defendants. In support of the contention that the return is so admissible, reliance has been placed by the learned vakil for the appellants upon the principle deducible from the cases of *Kowsulliah Sundari Dasi* v. *Mukta Sundari Dassi* (1) and *In re Whiteley and Roberts' Arbitration* (2).

(1) (1885) I. L. R. 11 Calc. 588. (2) [1891] 1 Ch. 558.

1911

CHALHO SINGH v. JHARO SINGH.

In the case first mentioned, reliance was placed by Sir Richard Garth, C. J., upon a passage from Taylor on Evidence (Vol. I, s. 743) to the following effect: "When several persons are jointly interested in the subject matter of the suit, the general rule is that the admissions of any one of those persons are receiveable against himself and fellows, whether they be all jointly suing or sued, provided the admission relates to the subject matter in dispute and is made by the declarant in his character of a person jointly interested with the party against whom the evidence is tendered": *Kemble* v. *Farran* (1) and *Lucas* v. *De la Cour* (2). The learned Chief Justice then went on to explain that the principle of this rule is, that for the purpose of making these statements with reference to the joint concern or common subject of interest, one partner or co-contractor is considered to be the agent of the others; and this rule is enacted, though in a somewhat concise form, in s. 18 of the Indian Evidence Act. The same principle is recognised in the second case on which reliance is placed: *In re Whiteley and Roberts' Arbitration* (3). In that case Mr. Justice Kekewich points out that "as a rule, the admission of any one party, though it can be produced in evidence against himself, cannot be adduced in evidence against any other party. There are well-known and recognised exceptions to that rule which may be classed under two heads. One of them is, when the party against whom the admission is sought to be read has a joint interest with the party making the admission in the subject matter—in the thing to which the admission relates. That, of course, depends upon the legal principle that persons seized jointly are seized of the whole: each

(1) (1829) 3 C. & P. 623. (2) (1813) 1 M. & S. 249.
(3) [1891] 1 Ch. 558.

being seized of the whole, the admission of either is the admission of the other, and may be produced in evidence against that other. That is applied from real property law to other matters. The other exception is, where the party against whom the admission is sought to be used takes what he claims in the subject matter from the person who made the admission, as in the case where it is sought to read against the heir, an admission made by the ancestor. He stands in the shoes of the party making the admission. He can only claim what he claims because he derives title in that way; and therefore it is only fair, according to legal principles, that he should be bound by the admission of him through whom he claims." The substance of the matter is that an admission is admissible either because it has been made by the person or by the predecessor or the agent of the person, against whom it is sought to be used. In the case before us, it is fairly clear that the land to which the plaintiffs lay claim is not held by them under all the proprietors. Persons interested to the extent of an one-fourth share of the superior interest made the return under the provisions of the Bengal Cess Act and they stated therein, as they were bound to do under law, the names of the tenants in occupation of specific lands. The statement which they made was against their interest. So far as we can gather, no similar return was made by the persons who represented the remaining three-fourths share of the superior interest, and the Revenue authorities appear to have assessed the road cess, as they were entitled to do, upon the return filed by the one-fourth shareholders. Under such circumstances, we are of opinion that the return filed by the one-fourth shareholders is admissible in evidence as against the remaining shareholders of the superior interest. We may add

1911

CHALHO SINGH v. JHARO SINGH.

that the case of *Nusseerun* v. *Goure Sunkur Singh*(1), upon which reliance is placed by the vakil for the respondent, is distinguishable. There the learned Judges held that another return must have been filed on behalf of the five annas shareholders who were persons other than the 11 annas shareholders who had made the return. As we understand that decision, it does not lay down any inflexible rule of law that a return under the Cess Act is admissible in evidence only against the person who made the return. In fact, if that case professes to lay down any such rule, it cannot be treated as a binding authority in view of the decision of the Judicial Committee already mentioned.

The result is, that this appeal is allowed, the decree of the District Judge set aside, and the case remanded to him in order that he may rehear the appeal treating the road-cess return as admissible in evidence. Costs to abide the result.

S. C. G. *Appeal allowed ; case remanded.*

(1) (1874) 22 W. R. 192.

APPELLATE CIVIL.

Before Justice Sir Asutosh Mookerjee and Mr. Justice Carnduff.

SEWDEO NARAIN SINGH

v.

AJODHYA PROSAD SINGH.*

1912

Jan. 9.

Road-cess returns—Evidence—Road-cess return filed by a temporary lessee—Bengal Cess Act (IX of 1880), s. 95—Evidence Act (I of 1872), s. 21.

The provisions of section 95 of the Bengal Cess Act are not exhaustive. They merely limit the application of section 21 of the Indian Evidence Act, and exclude road-cess returns when they are sought to be admitted in favour of the person by or on behalf of whom they have been filed.

A road-cess return filed by a person in his capacity as a temporary lessee of a certain property is admissible in evidence in favour of the superior landlord, inasmuch as he could not be regarded as a person by or on behalf of whom the return was filed.

SECOND APPEAL by the plaintiffs, Sewdeo Narain Singh and others.

This appeal arose out of a suit brought by the plaintiffs landlords for recovery of arrears of rent. The plaintiffs alleged that the defendants held the land at a produce rent. The defendants pleaded that they held the land at a money-rent. On behalf of the plaintiffs a road-cess return, filed in 1896 by a *ticcadar* of the property, was filed, which would go to show that the rent payable by the defendants was produce-rent.

The Court of first instance decreed the plaintiffs' suit at the rate admitted by the defendants. On appeal by the plaintiffs the lower Appellate Court having held that the road-cess return was not admissible in

* Appeal from Appellate Decree, No. 167 of 1910, against the decree of C. W. E. Pittar, District Judge of Patna, dated Oct. 12, 1909, affirming the decree of Durga Das Bose, Subordinate Judge of Patna, dated July 8, 1908.

1912

SEWDEO NARAIN SINGH v. AJODHYA PROSAD SINGH.

evidence against the defendants respondents, affirmed the decision of the first Court.

Against this decision the plaintiffs appealed to the High Court.

Babu Umakali Mukherjee (*Babu Ganesh Dutt Singh* with him), for the appellant. The road-cess return was wrongly rejected by the Court below. It was filed by a temporary lessee of the property during the continuance of the lease. Therefore it could not be said that it was filed by or on behalf of the superior landlord. It was sought to be used in evidence in favour of the superior landlord. That being so, section 95 of the Bengal Cess Act has no application, and the road-cess return should have been admitted in evidence.

Babu Sajani Kanta Sinha, for the respondent. Section 95 of the Bengal Cess Act applies to the facts of the present case. The road-cess return filed by the *ticcadar* must be taken to have been filed, although not by the superior landlord, but on his behalf. Therefore, the Court below was right in not admitting in evidence the road-cess return. During the continuance of the *ticca*, a part of the proprietory interest of the property was acquired by the *ticcadar*; therefore on the expiry of the lease the plaintiff must lie deemed to have acquired a part of the interest through the *ticcadar*.

MOOKERJEE AND CARNDUFF JJ. This is an appeal on behalf of the plaintiffs in a suit for recovery of arrears of rent. The substantial question in controversy between the parties relates to the character of the holding, whether it is a holding at a money-rent as the tenants allege or at a produce rent as the landlords contend. The Courts below have concurrently decided this question in favour of the tenants. That

decision has been attacked in this Court as erroneous in law, because relevant evidence has been excluded. The evidence in question is a road-cess return filed in 1896 by a *ticcadar* of the property, by name Biswanath Singh. The learned vakil for the appellant has contended that the road-cess return is admissible in evidence—*first*, because it was used in evidence against the plaintiffs by the defendants in another suit for declaration of title; *secondly*, because section 95 of the Bengal Cess Act of 1880 does not present a bar to the admission of the road-cess return; and, *thirdly*, because the person by whom it was filed was no other than a *benamidar* for the grand-father of the defendants themselves.

In so far as the first reason assigned by the appellants is concerned, we do not feel impressed by it. The mere circumstance that the road-cess return has been successfully used in evidence by the tenants against their landlords for the purposes of another litigation does not show that it is admissible in evidence in the present litigation on behalf of the landlords themselves.

In so far, however, as the second ground is concerned, it is in our opinion well founded. Section 95 of the Bengal Cess Act has no application to the case before us. That section provides that every return filed by or on behalf of any person in pursuance of the provisions of the Act shall bear the signature and address of such person or his authorised agent, and shall be admissible in evidence against such person but shall not be admissible in his favour. Now, as was pointed out in the cases of *Mohan Pandey* v. *Lala Bhagwati Charan* (1) and *Chalho Singh* v. *Jharo Singh* (2) the provisions of section 95

(1) (1909) 1 Ind. Cas. 813

(2) See *ante*, p. 995.

1912

SEWDEO NARAIN SINGH v. AJODHYA PROSAD SINGH.

of the Bengal Cess Act are not exhaustive. They merely limit the application of section 21 of the Indian Evidence Act and exclude road-cess returns when they are sought to be admitted in favour of the person by or on behalf of whom they have been filed: *Hem Chandra Chowdhry* v. *Kali Prosanna Bhaduri* (1). It has not been disputed that if a road-cess return is not admissible in favour of such person, it is equally inadmissible in favour of a person who claims through him or who may be deemed to be his representative in interest. Now, in the case before us, the road-cess return was not filed by the present plaintiffs, nor was it filed on their behalf. It was filed by Biswanath Singh in his capacity as temporary lessee of the property. The question, therefore, arises whether when the plaintiffs seek to have the document admitted in evidence, they can rightly be regarded as persons by or on behalf of whom the return has been filed. In our opinion, the question ought to be answered in the negative. The learned vakil for the respondent has ingeniously contended that as during the subsistence of the *ticca* a part of the superior interest was vested in the *ticcadar*, upon the expiry of the term of the *ticca* when the landlord became the sole owner, he must be deemed to have acquired a part of the interest through his *ticcadar*. This argument is obviously unsound. The landlord cannot be said to claim through his tenant in whose favour he had created an interest limited for a time. We are, therefore, of opinion that the road-cess return is admissible in evidence, notwithstanding the provisions of section 95 of the Bengal Cess Act.

As regards the third reason assigned on behalf of the appellant, it is obvious that if the road-cess return was as a matter of fact made by a predecessor in

(1) (1903) I. L. R. 30 Calc. 1033.

interest of the defendants, its evidentiary value in favour of the plaintiff and against the defendants is very considerable. This does not appear to have been appreciated by either of the Courts below, and consequently the question of *benami* has not been investigated.

The result is that this appeal is allowed, the decree of the District Judge set aside and the case remanded to him for reconsideration. The road-cess return will be treated as admissible in evidence, and the question of *benami* must also be determined. The parties will be at liberty to adduce additional evidence in regard to this point. Such evidence may be taken either by the District Judge himself or under his direction by the Subordinate Judge.

We may add that a subsidiary question has been raised before us, namely, whether in the event of a finding adverse to the landlords the amount of rent payable in cash should not be assessed in this proceeding. We are of opinion that the question ought not to be determined in this suit. If the plaintiffs are unable to establish that they are entitled to recover the amount claimed by them, the only decree they can legitimately obtain is a decree for the sum admitted by the defendants. What is a fair rent in respect of this land must be determined in a proceeding properly framed for that purpose. The costs of this appeal will abide the result.

S. C. G. *Appeal allowed; case remanded.*

APPELLATE CIVIL.

Before Mr. Justice Coxe and Mr. Justice Imam.

1912

March 27.

KESOBATI

v.

MOHAN CHANDRA MANDAL.*

Ghatwali tenure—Attachment—Receiver, appointment of—Execution of decree.

On an application for execution of a decree, although an order directing attachment of a ghatwali estate may be erroneous, an order appointing a Receiver to receive the rents and profits of such estate is sanctioned by authority.

Udoy Kumari Ghatwalin v. *Hari Ram Shaha* (1) referred to.

APPEAL by the defendant, Rani Kesobati.

This appeal arose out of an application for execution of a decree. One Mohan Chandra Mandal obtained a decree against the defendant Rani Kesobati, on a compromise, for a sum of Rs. 11,000. It was stipulated that the said sum would be payable in three instalments and on failure to pay any two consecutive instalments the decree-holder would be entitled to realize the entire amount due at the time of such default from the estate of the late Raja Udit Narayan Singh (deceased husband of the defendant) and from the defendant personally by executing the entire decree. There having been default in the payment of the first two instalments, the decree-holder applied in the Court of the Subordinate Judge of Dumka for execution of the decree for the entire amount. He prayed, that inasmuch as the immoveable properties (13 Taluks)

* Appeal from order, No. 645 of 1911, against the order of the Subordinate Judge of Dumka, Sonthal Parganas, dated Dec. 1, 1911.

(1) (1901) I. L. R. 28 Calc. 483.

in the possession of the judgment-debtor Rani Kesobati were declared in another suit to be ghatwali, and as she had no other valuable properties from which the decree could be satisfied, the decretal amount be realized by the appointment of a Receiver of the said 13 Taluks. On a notice being issued on the judgment-debtor why a Receiver should not be appointed, she appeared and stated that she had arranged to raise a loan and prayed for an adjournment of 15 days to execute the necessary documents for the loan, to pay off the decree-holder. The learned Subordinate Judge by an order dated the 1st December 1911 rejected the application of the judgment-debtor, directed the properties to be attached, appointed the Deputy Commissioner, as Receiver, and issued directions to the *musta jirs* and raiyats not to pay rents to anybody other than the Deputy Commissioner or his duly constituted agents. The judgment-debtor was forbidden to make any collection till the attachment was withdrawn. Against this order the judgment-debtor appealed to the High Court.

Dr. Rashbehary Ghose (Babu Gunada Charan Sen with him), for the appellant. A ghatwali tenure being in the nature of a salary attached to a public office cannot be attached in execution of a decree: see section 60 of the Code of Civil Procedure, and section 62 cl. (*f*) of the Transfer of Property Act. It could neither be attached nor could a Receiver be appointed of the rents and profits of such tenure: see *Bally Dobey* v. *Ganei Deo* (1), *Sartuk Chunder Dey* v. *Bhugut Bharut Chunder Singh* (2), *Rajkeshwar Deo* v. *Bunshidhur Marwari* (3), *Nilmoni Singh Deo* v. *Bakra Nath Singh* (4) and *Binoderam* v. *The Deputy*

(1) (1882) I. L. R. 9 Calc. 388.
(2) (1853) S. D. A. 900.
(3) (1896) I. L. R. 23 Calc. 873.
(4) (1882) I. L. R. 9 Calc. 187, 207.

1912

KESOBATI v. MOHAN CHANDRA MANDAL.

Commissioner of Sonthal Pergunnahs (1). The tenure is not assignable nor are the rents and profits of it, so the Court is incompetent to appoint a Receiver : see *Knill* v. *Dumergui* (2), *Birch* v. *Birch* (3), *Lucas* v. *Harris* (4) and *Binoderam Sein* v. *The Deputy Commissioner of Sonthal Pergunnahs* (5). Remuneration paid to a public servant for discharge of duties is extra-commercial. The case of *Udoy Kumari Ghatwalin* v. *Hari Ram Shaha* (6) proceeded upon a wrong basis. If at all a Receiver can be appointed, it cannot be done without setting apart a fair remuneration for the ghatwal.

Babu Mohendra Nath Roy (*Babu Peary Mohan Sikdar* with him), for the respondent. The tenure attached is a Khurrugpur ghatwali tenure; such a tenure is attachable. The contention that a ghatwali tenure is not attachable, and as such a Receiver could not be appointed, was not raised in the Court below, and it ought not to be allowed to be raised now. The question raised is not a question of law, but is a pure question of fact. A ghatwali tenure is property within the meaning of section 51 of the Civil Procedure Code. The Court has power generally to appoint a Receiver of the property of the judgment-debtor. Under Order XL rule 1 a Court may appoint a Receiver of any property; it was not suggested by either side that a ghatwali tenure in the hands of a ghatwal is not property; that being so, a Court can appoint a Receiver with regard to such property. A Ghatwali tenure in Khurrugpur is liable to sale in execution of a decree. In the case of *Udoy Kumari Ghatwalin* v. *Hari Ram Shaha* (6), it was pointed out that an application for the appointment of a Receiver ought to have been made

(1) (1867) 7 W. R. 178, 179.
(2) [1911] 2 Ch. 199.
(3) (1883) 8 P. D. 163.
(4) (1886) 18 Q. B. D. 127.
(5) (1866) 6 W. R. 129.
(6) (1901) I. L. R. 28 Calc. 483.

in that case. The profits ought to have been regarded as personal property of the ghatwal; see *Rajkeshwar Deo* v. *Bunshidhur Marwari* (1). Section 60 of the Code of Civil Procedure no doubt provides that salaries of a particular description are not attachable, but it cannot therefore be asserted as a general rule that no salary can be attached.

Babu Gunoda Charan Sen, in reply.

Cur. adv. vult.

COXE AND IMAM JJ. This is an appeal against an order of the Subordinate Judge of Dumka allowing an attachment of the estate of the judgment-debtor and appointing a Receiver.

By a compromise between the parties in Appeal from Original Decree No. 467 of 1907, it was decreed that the decretal amount was to be paid to the decree-holder in three instalments and failure to pay any two consecutive instalments was to entitle the plaintiff decree-holder to realize the entire amount due at the time of such default by executing the entire decree, it being further stated in the petition of compromise that the decretal amount was realizable from the estate of the late Raja Udit Narain Sing (the deceased husband of the judgment-debtor) as well as from the defendant judgment-debtor personally.

There having been default in the payment of two consecutive instalments, the decree-holder applied for execution of his entire decree and prayed for realization of the decretal amount by the appointment of a Receiver for 13 Taluks mentioned in the schedule to the application. This application states as a ground for the realization of the decretal amount by means of a Receiver the fact that in another suit the 13 Taluks had

(1) (1896) I. L. R. 23 Calc. 873.

1912

KESOBATI v. MOHAN CHANDRA MANDAL.

been declared ghatwali. On this application the judgment-debtor was called upon to show cause why her estate should not be attached and placed under a Receiver. She appeared and applied for two weeks' time (which application was refused), and the whole of her estate, with some exceptions specified in the order, was attached and the Deputy Commissioner was appointed Receiver, the Court issuing directions to the *mustajirs* and raiyats not to make payments to anybody other than the Deputy Commissioner or his duly constituted agents. The judgment-debtor was forbidden to make any collections during the continuance of the attachment.

Though the order relates to two matters, *viz.*, attachment and the appointment of a Receiver, this appeal is in respect of the latter only. A preliminary objection that no appeal lay was raised on behalf of the respondent, but as it was not pressed we need not deal with it at any length. It will be sufficient for us to say that in our view an appeal does lie against the order of the Subordinate Judge.

Though in the grounds of appeal no exception has been taken to the attachment, the argument on behalf of the appellant addressed to us has been directed mainly to show that a ghatwali estate is not liable to attachment and sale in execution of a decree and we have been referred to the cases of *Nilmoni Singh Deo* v. *Bakranath Singh* (1), *Ram Chunder Singh* v. *Madho Kumari* (2), *Kustoora Kumaree* v. *Binoderam Sein* (3), *Binoderam* v. *The Deputy Commissioner of Sonthal Pergunnahs* (4), *Binoderam Sein* v. *The Deputy Commissioner of Sonthal Pergunnahs* (5), and *Udoy Kumari Ghatwalin* v. *Hari Ram Shaha* (6).

(1) (1882) I. L. R. 9 Calc. 187.
(2) 1885) I. L. R. 12 Calc. 484, 490.
(3) (1865) 4 W. R. Mis. 5.
(4) (1867) 7 W. R. 178.
(5) (1866) 6 W. R. 129.
(6) (1901) I. L. R. 28 Calc. 483.

On a consideration of these cases we are unable to say that they go so far as to lay down that the surplus rents and profits of ghatwali tenures cannot be attached in the lifetime of the ghatwal, though they do lay down that the estate itself cannot be attached. The case of *Kustoora Koomaree* v. *Binoderam Sein* (1), is clear authority for the proposition that the surplus-proceeds of a ghatwali tenure collected during the lifetime of the judgment-debtor are his personal property and thus liable to be taken in execution. In *Surajmal Marwari* v. *Kristo Pershad Singh* (2), it was held that the income of a ghatwali property was not itself ghatwali property, and as such was liable to be sold. The appointment of a Receiver in this case is in entire accord with the view taken in the case of *Udoy Kumari Ghatwalin* v. *Hari Ram Shaha* (3), which like *Rajkeshwar Deo* v. *Bunsidhur Marwari* (4), came from the Sonthal Pergunnahs. It may be open to question whether a Receiver ought to be appointed to collect rents and profits that have not accrued at the time of the appointment, but we do not think that we ought in the present case to dissent from the decision in *Udoy Kumari Ghatwalin* v. *Hari Ram Shaha* (3). For all that we know to the contrary, rents and profits may have accrued prior to the appointment. Had there been merely a prohibitory order issued to the ghatwal not to receive any rents and profits from the raiyats and also to the raiyats not to pay their rents to the ghatwal without the appointment of a Receiver, the order might have been open to question, but the appointment of a Receiver to receive the rents and profits seems to us an order sanctioned by authority. The order for attachment of the estate may be

(1) (1865) 4 W. R. Mis. 5.
(2) (1906) 10 C. W. N. cclx.
(3) (1901) I. L. R. 28 Calc. 483.
(4) (1896) I. L. R. 23 Calc. 873.

1912

KESOBATI v. MOHAN CHANDRA MANDAL.

erroneous, but as the practical effect of the appointment of the Receiver is merely to ensure that the rents and profits are properly dealt with, we do not think it necessary to interfere. We, therefore, in the view we take, dismiss this appeal, but in the circumstances we do not allow costs.

S. C. G.

Appeal dismissed.

APPELLATE CIVIL.

1912

April 2.

Before Mr. Justice D. Chatterjee and Mr. Justice N. R. Chatterjea.

RAIMONI DASSI

v.

MATHURA MOHAN DEY.*

Kabuliyat—Lease—Landlord and Tenant—Kabuliyat without pottah if constitutes a lease—Transfer of Property Act (IV of 1882) ss. 4, 105 and 107—Amending Act (III of 1885), s. 3—Registration Acts (III of 1877), s. 3, and (XVI of 1908), s. 2(7).

A registered *kabuliyat* signed by the lessee and accepted by the lessor is sufficient to constitute a lease within the meaning of section 107 of the Transfer of Property Act.

Akram Ali v. *Durga Prasanna Roy Chowdhuri*(1) referred to.

Nand Lal v. *Hanuman Das* (2), *Kashi Gir* v. *Jogendro Nath Ghose* (3), *Sheo Karan Singh* v. *Maharaja Parbhu Narain Singh* (4), *Turof Sahib* v. *Esuf Sahib* (5), *Kaki Subbanadri* v. *Muthu Rangayya* (6) discussed.

Syed Ajam Sahib v. *Madura Sree Meenatchi Sundareswarar Devastanam* (7) approved.

Nilmamud Sarkar v. *Boul Das* (8) distinguished.

* Appeal from Appellate Decree, No. 1411 of 1909, against the decree of J. E. Phillimore, District Judge of Sylhet, dated March 16, 1909, confirming the decree of Adaitya Chandra Chakravarti, Subordinate Judge of Sylhet, dated Oct. 5 1907.

(1) (1910) 14 C. L. J. 614.
(2) (1904) I. L. R. 26 All. 368.
(3) (1904) I. L. R. 27 All. 136.
(4) (1909) I. L. R. 31 All. 276.
(5) (1907) I. L. R. 30 Mad. 322.
(6) (1909) I. L. R. 32 Mad. 532.
(7) (1910) 21 Mad. L. J. 202.
(8) (1909) 14 C. W. N. 73.

1912

RAIMONI DASSI v. MATHURA MOHAN DEY.

SECOND APPEAL by Raimoni Dassi and others, the plaintiffs.

On the 14th Magh 1310 B. S., Mathura Mohan Dey executed in favour of one Brahmamoyee Dassi a registered *i'ara kabuliyat*, by which he undertook to collect the rent of 48 *hals* and odd of lands belonging to the latter for the period of three years, viz., 1310 to 1312, and agreed, *inter alia*, to pay her Rs. 400 a year. On the 19th Bhadra 1311, Brahmamoyee Dassi died, leaving as her heirs her daughter, Raimoni Dassi, and five grandsons. As no payments were made either to Brahmamoyee Dassi or her successors in nterest, the latter, on the 27th Assar 1313, instituted a suit on the said *kabuliyat* in the Court of the Subordinate Judge, for recovery of rent for the said period of three years and interest thereon.

The defendant raised various contentions, the principal among them being, that the *kabuliyat* was inoperative, because Brahmamoyee Dassi contrary to her promise did not execute a *pottah* in favour of the defendant; that nine plots comprised in one of the forty-eight *hals* of land mentioned in the *kabuliyat* did not belong to Brahmamoyee Dassi, but belonged to the defendant and another person as *maliks* from long before the date of the *kabuliyat*, which was executed by the defendant without a full knowledge of its contents; that the defendant was never allowed to take possession of the lands, he never received any collection papers to enable him to collect the rents and he never collected any of the rents; that, subsequent to the registration of the *kabuliyat*, the defendant had rescinded the *kabuliyat* by notice to Brahmamoyee Dassi and had never acted upon it and was, therefore, not liable to the plaintiffs for any rent or interest.

The Subordinate Judge found these contentions in favour of the defendant and dismissed the suit. On

1912

RAIMONI DASSI v. MATHURA MOHAN DEY.

appeal, it was held, that the registration of the *kabuliyat* was a sufficient compliance with section 107 of the Transfer of Property Act, and there was a valid contract creating the relationship of landlord and tenant between the parties; that the *kabuliyat* was duly executed and that no fraud, or misrepresentation, or constructive fraud had been practised on the defendant to secure its execution; that, as regards the nine plots of land covered by the *kabuliyat*, there was some difficulty in ascertaining the actual facts, as there was no local investigation, but that, as held incidentally by the Subordinate Judge, the *chittas* and *kobalas* filed by the defendant showed that the said nine plots of land were in the possession of the defendant and another person as *maliks* from long before the date of the said *kabuliyat;* and, finally, that the mistake as regards these nine plots of land was with reference to a matter of fact essential to the agreement, and, therefore, the agreement was void altogether and the plaintiff was not entitled to recover rent. Thereupon, the plaintiffs appealed to the High Court.

Babu Provas Chandra Mitter and *Babu Susil Madhub Mallik*, for the appellants. The findings of the lower Appellate Court were in favour of the appellants, except with regard to the nine plots of land alleged to belong to the respondent and another person as *maliks*. If these nine plots were not really the appellants' property, and this should have been decided as a matter of fact, the mistake in their inclusion in the *kabuliyat* was not such as would render it void, and there ought to have been an apportionment of the rent and a decree given for a proportionate amount to the appellants.

Babu Harendra Narayan Mitter and *Babu Narendra Narain Sett*, for the respondent. In order

to constitute a lease under section 107 of the Transfer of Property Act, there ought to have been a *pottah* granted by the appellants to the respondent. As there was no *pottah* in the present case, the appellants were not entitled to construe the *kabuliyat* as a lease: see *Nilmamud Sarkar* v. *Boul Das* (1). The parties were not *ad idem*, and this being so, the *kabuliyat* could not be construed to be operative between them. If there is to be a remand, the question whether or not the parties were *ad idem* will have to be one of the questions to be decided.

Babu Provas Chandra Mitter, in reply. Comparing sections 145 and 107 with sections 58 and 59 of the Transfer of Property Act, it will be found that the acceptance of the landlord constitutes the tenancy, and it is not necessary for the lessor to sign and deliver a *pottah* to the lessee. The absence of the word "implied" in sections 58 and 59 of the Transfer of Property Act is significant and in my favour. This word is used in section 105 of this Act, and it means implied from the transaction. It is no answer to this suit that the plaintiffs have not executed their part of the contract by not granting a *pottah*: see *Cooch* v. *Goodman* (2).

Cur. adv. vult.

N. R. CHATTERJEA J. This appeal arises out of a suit for recovery of *jiara* rent, based upon an *ijara kabuliyat* executed by the defendant in favour of the predecessor in interest of the plaintiffs, whereby the defendant undertook to collect rent of 48 and odd *hals* of lands for three years and agreed to pay to the lessor Rs. 400 a year.

The defence was that the contract was not completed, as no *pottah* was granted by the lessor, that the

(1) (1909) 14 C. W. N. 73. (2) (1842) 2 Q. B. 580.

1912

RAIMONI DASSI v. MATHURA MOHAN DEY.

CHATTERJEA J.

lessor never allowed the defendant to take possession of the lands, that one *hal* of land (nine plots) which really belonged to the defendant had been fraudulently included in the *kabuliyat* which was executed without full knowledge of its contents, and that as the *kabuliyat* was not corrected the defendant surrendered the lease, that the *kabuliyat* was never acted upon and that the defendant was not, therefore, liable to pay anything.

The Court of first instance, finding all the above pleas in favour of the defendant, dismissed the suit. On appeal, the lower Appellate Court held, that the registration of the *kabuliyat* was a sufficient compliance with the provisions of section 107 of the Transfer of Property Act, that the absence of a *pottah* does not invalidate the contract, that the *kabuliyat* was duly executed and there was no fraud or misrepresentation practised on the defendant to secure its execution.

As regards the nine plots of land, the lower Appellate Court held that there was some difficulty in ascertaining the actual facts, as there had been no local investigation, but that he agreed with the Subordinate Judge, who had gone into the question incidentally, in holding that the nine plots were in possession of the defendant and his co-sharers from long before the date of the *kabuliyat* as *maliks*. The lower Appellate Court, however, held, that an agreement to pay rent for land already in the lessee's possession as owner is void, and that the mistake in including the nine plots of land was regarding a matter of fact essential to the agreement, and, therefore, the agreement was altogether void and plaintiff was not entitled to recover rent.

The plaintiffs have appealed to this Court, and it has been contended on their behalf that the lower Appellate Court having held that the *kabuliyat*

constituted the contract of lease and was duly executed, and the case of fraudulent misrepresentation having been found against the defendant, the lower Appellate Court ought to have decided the question whether as a matter of fact the nine plots really belonged to the defendant, and even if they belonged to the defendant, the plaintiffs ought to have been given a decree for proportionate rent for the remaining lands.

On behalf of the defendant respondent it has been contended that in the absence of a *pottah*, the *kabuliyat* could not constitute a lease within the meaning of section 107 of the Transfer of Property Act. It has been further contended that even if the *kabuliyat* operated as a lease and if the case should be remanded at all, there was a number of questions raised in the case which were decided by the Court of first instance but were not decided by the lower Appellate Court, and that the latter should be directed to decide the said questions.

So the first question for consideration is, whether a registered *kabuliyat* executed by the lessee and accepted by the lessor operates as a lease within the meaning of section 107 of the Transfer of Property Act.

There can be no question in this case that the *kabuliyat* was accepted by the lessor, as the suit has been based upon it.

Section 105 of the Transfer of Property Act defines a lease of immoveable property as a transfer of a right to enjoy such property made for a certain time, express or implied, or in perpetuity, in consideration of a price paid or promised or of money, a share of crops, service or any other thing of value, to be rendered periodically or on specified occasions, to the transferor by the transferee who accepts the transfer on such terms. The section does not prescribe how

1912

RAIMONI DASSI v. MATHURA MOHAN DEY.

CHATTERJEA J.

the transfer is to be effected. Section 107 prescribes the mode in which a lease is to be effected, and provides that a lease of immoveable property from year to year or for any term exceeding one year or reserving a yearly rent can be made only by a registered instrument. Section 4 of the Transfer of Property Act provides that section 107 and certain other sections shall be read as supplemental to the Indian Registration Act, 1877, which means that it is to be read as supplemental to all the provisions of the Registration Act. Under section 3 of the Registration Act of 1877 a lease includes a *kabuliyat*. Reading sections 4 and 107 of the Transfer of Property Act together with section 3 of the Registration Act of 1877, it would appear that a lease in section 107 includes a *kabuliyat*. Section 107 of the Transfer of Property Act does not require that the instrument shall be signed by the lessor. The only thing required by it is that the lease (*i.e.*, the transfer of a right to enjoy property) should be effected by a registered instrument. Now if the parties to a lease, viz., the lessor and the lessee, agree that the lessee is to have a right to enjoy a property on certain terms and that the fact of the transfer of such right is to be embodied in an instrument, to be executed by the lessee only and accepted by the lessor, there is no reason why a lease cannot be effected by such an instrument, provided it is registered, which is the only condition required by section 107 of the Transfer of Property Act. The argument that in order to constitute a lease there must be a *pottah*, *i.e.*, a writing signed by the lessor, proceeds upon the assumption that the *kabuliyat* is only an unilateral expression of intention on the part of the lessee only, but it is, as I have said above, the embodiment of the whole contract between the lessor and the lessee, viz., the transfer by the lessor of the right to enjoy the

property on certain terms, and the acceptance by the lessee of the right on those terms.

The case of a sale does not stand on the same footing, as there is no provision in the Registration Act relating to sales such as is contained in section 3 relating to a lease, viz., that it includes a *kabuliyat*.

It is a common practice in this country where no *pottah* is executed to treat a *kabuliyat*, accepted by the lessor, as the instrument creating a tenancy, and there can be no question that before the passing of the Transfer of Property Act a lease could be effected by an instrument signed by the lessee only and registered in cases where registration was compulsory. Under section 3 of the Registration Act, 1877, a lease includes a *kabuliyat*. So that before the passing of the Transfer of Property Act in cases where a registered instrument was necessary under the Registration Act, a *kabuliyat* executed by the lessee if registered was legally sufficient to constitute a lease. It was not necessary for the creation of a lease that the landlord should grant a *pottah*. It was sufficient if the tenant executed a *kabuliyat* which was accepted by the landlord: see *Akram Ali* v. *Durga Prasanna Roy Chowdhuri* (1). Section 105 of the Transfer of Property Act does not introduce any change in the legal conception of a lease, which, before the passing of that Act, could be effected by a registered instrument signed by the lessee only. The provisions in section 4 of the Transfer of Property Act that section 107 and certain other sections of that Act shall be read as supplemental to the Indian Registration Act, 1877, was introduced into that Act by the Amending Act of 1885 (Act III of 1885). So far, therefore, from laying down that an instrument of lease does not include a *kabuliyat*, and therefore must be an instrument signed by the lessor, it makes section

(1) (1910) 14 C. L. J. 614.

1912

RAIMONI DASSI v. MATHURA MOHAN DEY.

CHATTERJEA J.

107 supplemental to all the provisions of the Registration Act including section 3, and the provision in section 3 of the Registration Act III of 1877, that a lease includes a *kabuliyat*, has been re-enacted without any modification in section 2 (7) of the Registration Act of 1908.

The Legislature has prescribed no form for a lease, and in the absence of any provision in the Transfer of Property Act that a lease in order to be valid must be signed by the lessor, I am unable to hold that a registered *kabuliyat* which is accepted by the lessor is not a lease within the meaning of section 107 of the Transfer of Property Act.

As to the authorities on the point, the earlier cases in the Allahabad High Court were in favour of the view, that a *kabuliyat* cannot be considered as a lease within the meaning of section 107, Transfer of Property Act. In *Nand Lal* v. *Hanuman Das* (1), Blair J. followed an earlier decision of Edge C.J., and Burkitt J., in which the learned Judges held, that *kabuliyat* is merely an agreement executed by a tenant to take the tenancy, and that in itself it contains no agreement of the landlord on his part to lease the land. It does not appear whether in that case there was acceptance of the *kabuliyat* by the landlord. Blair J. was of opinion that the word 'instrument' in section 107 shows, that the document must be one which must have certain executive force, and that upon its execution the lease is completed. Banerji J. did not desire to express any opinion on the question, having regard to the fact that it is a common practice in these provinces to treat a *kabuliyat* as the instrument creating a tenancy, and that a ruling upholding the contrary view may unsettle titles. The case of *Kashi Gir* v. *Jogendro Nath Ghose* (2) was heard by Blair J., sitting

(1) (1904) I. L. R. 26 All. 368. (2) 1904) I. L. R. 27 All. 136.

singly, and he followed his judgment in *Nand Lal* v. *Hanuman Dass* (1).

The question was raised before a Full Bench of the Allahabad High Court in the case of *Sheo Karan Singh* v. *Maharaja Parbhu Narain Singh* (2), but the Full Bench expressed no opinion on the point inasmuch as they found that under the circumstances of the case the plaintiff was clearly entitled to recover compensation for use and occupation. The Full Bench seem to have been in doubt as to the correctness of the earlier decisions, as they declined to express any opinion as to their correctness.

In the Madras High Court, Benson and Wallis JJ., held in *Turof Sahib* v. *Esuf Sahib* (3) that a lease must be an instrument bearing the signature of the lessor, and that case was followed by Benson and Miller JJ. in *Kaki Subbanadri* v. *Muthu Rangayya* (4). In none of the cases cited above, except in the last case, was any reference made to section 4 of the Transfer of Property Act. It is not necessary to consider, however, the cases in the Madras High Court in detail, because in the recent case of *Syed Ajam Sahib* v. *Madura Sree Meenatchi Sundareswarar Devastanam* (5) a Full Bench of that Court held, after an exhaustive discussion of the matter, that the registered instrument referred to in section 107 of the Transfer of Property Act, in order to be valid, need not be signed by the lessor.

In our court in the case of *Nilmamud Sarkar* v. *Boul Das* (6), the learned Judges (Chitty and Carnduff JJ.), agreeing with the cases of *Nand Lal* v. *Hanuman Das* (1), *Kashi Gir* v. *Jogendro Nath Ghose* (7) and

(1) (1904) I. L. R. 26 All. 368.
(2) (1909) I. L. R. 31 All. 276.
(3) (1907) I. L. R. 30 Mad. 322.
(4) (1909) I. L. R. 32 Mad. 532.
(5) (1910) 21 Mad. L. J. 202.
(6) (1909) 14 C. W. N. 73.
(7) (1904) I. L. R. 27 All. 136.

1912

RAIMONI DASSI v. MATHURA MOHAN DEY.

CHATTERJEA J.

1912

RAIMONI DASSI v. MATHURA MOHAN DEY.

CHATTERJEA. J

Turof Sahib v. *Esuf Sahib* (1), held, that a *kabuliyat*, which is only an undertaking by the prospective tenant to take the tenancy, is not a lease. Of course a *kabuliyat* executed by a lessee in itself does not create a lease, unless it is accepted by the landlord; and that case is distinguishable, as in that case one of the landlords at any rate did not accept the lease.

In a later case, *Akram Ali* v. *Durga Prasanna Roy Chowdhury* (2), Mookerjee and Coxe JJ., held, that it was impossible to maintain the view that, for the creation of a permanent lease before the Transfer of Property Act, it was necessary that the landlords should grant a *pottah*. The *kabuliyat* in that case was executed before the Transfer of Property Act, but the learned Judges with reference to the case of *Nilmamud* v. *Boul Das* (3) observed :—"We need not, therefore, decide whether under the Transfer of Property Act the law is different, but we observe that a Full Bench of the Madras High Court in *Ajam* v. *Madura* (4) has assigned weighty reasons in support of the view contrary to that maintained in *Nilmamud Sarkar* v. *Boul Das* (3)."

The result of the authorities, therefore, is this :—In the Madras High Court the earlier cases, which held the contrary view, must now be taken to have been overruled by the recent Full Bench, which supports our view. In the Allahabad High Court, although the earlier cases took a contrary view, a Full Bench of that Court declined to express any opinion as to the correctness of the earlier rulings, and in our own Court, though in one case the learned Judges agreed with the earlier Allahabad cases and one of the Madras cases, the case is distinguishable on the ground that one of the landlords did not accept the *kabuliyat*, and in the

(1) (1907) I. L. R. 30 Mad. 322.
(2) (1910) 14 C. L. J. 614.
(3) (1909) 14. C. W. N. 73.
(4) (1910) 21. Mad. L. J. 202.

latest case *Akram Ali* v. *Durga Prasanna Roy Chowdhuri* (1), the learned Judges observed, that the reasons given by the Full Bench of the Madras High Court were weighty, though the observation was by way of *obiter dictum*.

The weight of authority, therefore, appears to be rather in favour of the view I take than against it, and I am of opinion that a registered *kabuliyat* signed by the lessee and accepted by the lessor is sufficient to constitute a lease within the meaning of section 107 of the Transfer of Property Act.

The first contention raised on behalf of the respondent, therefore, must be overruled.

The next question is whether the inclusion of the nine plots of land in the possession of the defendant in the *kabuliyat* renders it void. The lower Appellate Court has found that there was no fraud or misrepresentation in the matter, and that there was only a mistake, but held that the mistake was regarding a matter of fact essential to the agreement, and, therefore, the agreement was void.

I cannot agree to this view. In the present case the lands in the possession of the defendant which are included in the *kabuliyat* are small in comparison with the total lands demised, and I am unable to hold that, in the absence of any fraud or misrepresentation, the mere inclusion by mistake of some lands in the possession of the defendant or belonging to him in the *kabuliyat* renders it altogether void. In such a case, I think, there should be an apportionment of the rent for the remaining lands.

I am of opinion that the lower Appellate Court should come to proper findings upon the following questions :—

First, whether the plaintiffs had a title to the nine plots (one *hal*) of land, of which the defendant was

(1) (1910) 14 C. L. J. 614.

1912

RAIMONI DASSI v. MATHURA MOHAN DEY.

CHATTERJEA J.

already in possession, How long was defendant in possession, and whether he had acquired any title by such possession.

Second, whether the plaintiff failed to deliver possession of the remaining 47 *hals* of land, and failed to supply the defendant with the *tauzi* and collection papers in order to enable the defendant to collect rent.

Third, whether the *kabuliyat* was acted upon.

Fourth, whether the defendant surrendered the *ijara* and was there a valid surrender.

If the last three questions are found in favour of the plaintiffs and the first question against them, the lower Appellate Court will apportion the rent with respect to the remaining lands. If the last three questions are found against the plaintiffs, the first question need not be gone into. The decree of the lower Appellate Court is accordingly set aside, and the case sent back to that Court for a decision of the case in accordance with the observation made above.

D. CHATTERJEE J. I agree.

O. M. *Appeal allowed; case remanded.*

APPELLATE CIVIL.

Before Justice Sir Cecil Brett and Mr. Justice Sharfuddin.

SARAT CHANDRA BOSE

v.

SECRETARY OF STATE FOR INDIA.*

1912

April 12.

"Shawls," meaning of—Railway administration, liability of—Loss of parcel—Railways Act (IX of 1890), s. 75, and Sch. II (m)—Value of contents of parcel if to be declared—Alwan—Damages, suit for—Costs.

The term "shawls" in Schedule II, cl. (*m*) of the Railways Act, refers to Indian shawls of special value, and cannot be taken to apply to articles of inferior value such as *alwans*.

SECOND APPEAL by the plaintiffs, Sarat Chandra Bose and others.

The plaintiffs, who carry on business as merchants at Gossain's Hât at Chikandi, in the district of Faridpur, booked a parcel in the name of their Calcutta agent containing country-made cloths and *alwans* at the Barabazar office of the Eastern Bengal State Railway in Calcutta for conveyance by them, the Rivers Steam Navigation Company, and the India General Navigation Company, Limited, to a place called Bejnishar, a steamer station on the river Padma. The goods were booked on the 13th of November 1906 for delivery to the plaintiff No. 1. They appeared to have been lost in transit. After some correspondence between the plaintiffs and the Railway and the Steamer authorities as to the loss of the goods, they (the plaintiffs) gave notice of suit through their pleader to the Collector of

* APPEAL from Appellate Decree, No. 244 of 1909, against the decree of M. M. Dutt, Subordinate Judge of Faridpur, dated Nov. 13, 1908, affirming the decree of Nani Gopal Mukherjee, Munsif of Chikandi, dated July 29, 1908.

1912

SARAT CHANDRA BOSE v. SECRETARY OF STATE FOR INDIA.

Faridpur and the Manager of the Eastern Bengal State Railway, claiming a certain sum of money as price of the goods lost and also as damages. The plaintiffs alleged that the Traffic Superintendent of the Railway Company thereupon offered terms of compromise, which not being favourable they brought the present suit.

The Manager of the Eastern Bengal State Railway and the Collector of Faridpur entered appearance and contested the suit. The Railway Company in their written statement admitted that the parcel had been booked and lost in transit over the railway. The defendants pleaded, *inter alia*, that the notice served on the Collector was not valid in law, and that under section 75 of the Indian Railways Act the Railway administration was not responsible for the loss of the goods.

The Court of first instance gave effect to the objections raised by the defendants, and dismissed the plaintiffs' suit. On appeal, the learned Subordinate Judge held that the goods booked by the plaintiffs came under the designation of "shawls," and as their value exceeded Rs. 100, the plaintiffs ought to have declared the contents of the parcel, and their value at the time of booking the parcel and they having failed to do so the defendants were not liable for the plaintiffs' claim; and he affirmed the decision of the first Court. Against this decision the plaintiffs appealed to the High Court.

Babu Jogesh Chandra Roy, for the appellant. The plaintiff was not bound to make the declaration as contemplated by section 75 of the Railways Act, inasmuch as the articles contained in the parcel were not "shawls" within the meaning of clause (*m*) of Schedule II of the Act. The packages contained

alwans, and they were not shawls within the meaning of the Act. Shawls include articles of special value, and do not include articles of inferior value: see *Lakhmidas Hira Chand* v. *The Great Indian Peninsula Railway Company*(1), and *Saminadha Mudali* v. *The South Indian Railway Company*(2).

Babu Ram Charan Mitra, for the respondents, Eastern Bengal State Railway. All articles which in common parlance are called shawls will include *alwans*. It nowhere appears that in the second schedule the word shawl includes articles of special value.

Babu Srish Chandra Chowdhury, for the India General Navigation Company. The Steamer Company was unnecessarily made a party, and as such should be discharged from all liability. The goods were lost in the transit over the railway, and did not come into the hands of the Steamer Company; that being so, the Steamer Company could not be held liable for any loss to the plaintiffs. Having regard to the provisions of the Carriers' Act (III of 1865), the Steamer Company is not liable for any loss during the transit: see *Narang Rai Agarwalla* v. *River Steam Navigation Company, Ld.*(3).

BRETT AND SHARFUDDIN JJ. The present appeal arises out of a suit brought by the plaintiffs appellants for recovery of damages for the loss of a packet containing clothes, *alwans*, and other articles which were despatched from Calcutta for conveyance by the Eastern Bengal State Railway, the Rivers Steam Navigation Company, and the India General Navigation Company, Limited, to a place called Bejnishar, a steamer station on the river Padma. The goods were

(1) (1867) 4 Bom. H. C. O.C. 129. (2) (1883) I. L. R. 6 Mad 420.
(3) (1907) I. L. R. 34 Calc. 419.

1912

SARAT CHANDRA BOSE v. SECRETARY OF STATE FOR INDIA.

booked on the 13th November 1906 by the plaintiffs in the name of their Calcutta agent, B. K. Sen, for delivery to the plaintiff No. 1. From the written statement filed on behalf of the defendant, Eastern Bengal State Railway, it appears that they admitted that the parcel had been booked and had been lost in transit over that railway. The defence set up in their behalf was, however, that the railway was not liable, because the plaintiffs had failed in compliance with the provisions of section 75 of the Railways Act to declare the contents of the parcel and their value, at the time of booking the parcel for carriage by the railway. The other defendants, the two Navigation Companies, put in a written settlement in which they disclaimed all liability for the loss of the parcel on the ground that the parcel never reached their hands, and that this fact was known to the plaintiffs. Certainly, from the admission made on behalf of the Eastern Bengal State Railway, it appears that no liability could attach to the two Steamer Companies, as the Railway Company distinctly admitted that the parcel was lost while in transit over the railway.

Certain preliminary points were taken against the admissibility of the suit, but all these have been found in favour of the plaintiffs. The only substantial point which has been decided by the lower Appellate Court against the plaintiff is that raised in the second issue. That point is whether the plaintiffs are entitled to recover in this suit the value of the goods contained in the parcel by reason of their failure to comply with the provisions of section 75 of the Railways Act (IX of 1890). That section provides that "when any articles mentioned in the second schedule are contained in any parcel or package delivered to a Railway administration for carriage by railway, and the value of such articles in the parcel or package exceeds one

hundred rupees, the Railway administration shall not be responsible for the loss, destruction, or deterioration of the parcel or package, unless the person sending or delivering the parcel or package to the administration caused its value and contents to be declared, or declared them at the time of the delivery of the parcel or package for carriage by railway, etc." In Schedule II attached to the Act, item (*m*) is "shawls," and the case for the defendant Railway Company was that some of the articles in the parcel consigned by the plaintiffs, being *alwans*, came under the term "shawls," and, as admittedly the plaintiffs had not declared their value under the provisions of section 75 of the Railways Act, that Company disclaimed all liability to pay the amount claimed in the suit. Both the lower Courts have accepted this contention on behalf of the Railway Company and have dismissed the suit.

The plaintiffs have appealed to this Court, and the main argument before us has been with regard to the question whether the term "shawls" as used in item (*m*) of Schedule II of the Railways Act covers goods such as those contained in the parcel assigned by the plaintiffs. The learned pleader for the appellants has described to us the contents of the parcel. Amongst them we find two pairs of *alwans* at Rs. 22-4 per pair, the total being Rs. 44-8, and certain *thans* of other materials and five pairs of *alwans* at Rs. 12-6 per pair. The question is whether articles of these descriptions are such as are covered by the term "shawls" in the second schedule attached to the Railways Act. The learned Subordinate Judge, in dealing with the question as to what is the meaning of "shawl", as used in the schedule, has referred to the definition of the word "shawl" as given in Webster's Dictionary. He considers that, as the term "shawl" is used in a

1912

SARAT CHANDRA BOSE v. SECRETARY OF STATE FOR INDIA.

law enacted in the English language, it must be understood in the English sense, irrespective of its meaning in India. He, therefore, arrives at the conclusion that the word "shawls" as used in the second schedule of the Railways Act must be taken to be "a cloth of wool, cotton, silk or hair used specially by women as a loose covering for the neck and shoulders," and he thinks that garments such as *alwans* which are manufactured with cotton or wool must come under this definition. On the other side, it is contended that the word "shawl", as used in the Act, means valuable articles such as are produced by the looms of Kashmere and Amritsar, and it is argued that the goods contained in the parcel certainly must fall within that description, if the plea of the defendants is to succeed. We have given the question our best consideration, and we are of opinion that the view which the learned Subordinate Judge has taken as to the meaning of the word "shawl" cannot be accepted. It is clear from the other items included in the second schedule of the Railways Act, that that schedule was intended to cover articles of special value. The Act which was passed in 1890 took the place of other Railways Acts which were then repealed and were passed in 1879, 1883 and 1886. Schedule II appears in the previous Acts and also in the Acts previous to them which they repealed, and we think that in determining the meaning of the word "shawl" we have, *first*, to consider what was the probable meaning which the Legislature intended to apply to such a term at the time when the schedule was first drawn up, and, *secondly*, to consider how far its meaning can be determined by reference to the other items in the schedule. Applying those rules, we are of opinion that there can be little doubt that, at the time when the schedule was first drawn up, it was

intended to cover Indian shawls of valuable materials. The term "shawl" is originally a Persian term, and was applied to valuable and special articles, and certainly had no possible application to the articles to which the learned Judge of the lower Appellate Court has thought the word "shawl", as used at present in the English language, now applies. The term "shawl" as used at the time when the schedule was drawn up obviously referred to valuable Indian shawls, as then understood in India, and could not be taken to apply to articles of inferior value such as the articles contained in the parcel, the subject of the present suit. Of the items of articles contained in the parcel only one is of any special value, and that is the first item, the two pairs of *alwans* at Rs. 22-4 per pair. In our opinion, judging both from the meaning of the word 'shawl" as accepted in India at the time when the Act was passed, and also from the fact that all the other items contained in the schedule are articles of special value, and also from the fact that article (*s*) in the schedule provides for the addition by the Governor-General in Council of other articles of special value to the schedule, the articles for the loss of which damages are claimed in the present suit cannot be regarded as falling within the description of "shawls" as contained in Schedule II of the Railways Act. We are of opinion, therefore, that the judgment and decree of the lower Appellate Court must be set aside.

The lower Appellate Court has not decided what is the price of the contents of the parcel which was lost, nor has it considered the evidence which seems to have been offered on that point. It has also not determined what compensation or interest the plaintiffs are entitled to recover. The appeal must, therefore, be sent back to the lower Appellate Court, in order that that Court may, after due consideration of the evidence, determine

1912

SARAT CHANDRA BOSE v. SECRETARY OF STATE FOR INDIA.

what is the amount which the plaintiffs are entitled to recover in the present suit.

On behalf of the Steamer Companies, the learned pleader has asked that we should come to some decision as to their liability to the present claims, and on this point we can only observe that, after the admission made by the defendant Railway Company that the parcel was lost in transit over the railway, no liability can possibly attach to the Steamer Companies. The result, therefore, is that, so far as the two Steamer Companies are concerned, the suit must stand dismissed, and, so far as the Railway Company is concerned, the case must go back to the lower Appellate Court in order that that Court may determine what compensation the plaintiffs are entitled to recover from them for the loss of the parcel.

The learned pleader for the Steamer Companies asks for their costs in this case; but we are not prepared to pass any order in their favour for costs against the plaintiffs, because the plaintiffs were not in a position when they instituted the suit to know whether the parcel was lost in transit over the railway or when carried by the Steamer Companies. So far as the Steamer Companies are concerned, the suit will stand dismissed, but without costs. The plaintiffs are, however, entitled to recover their costs of this appeal from the Railway Company. The costs in the lower Courts as between the plaintiffs and the Railway Company will follow the final result of the trial of the suit.

S. C. G.

Appeal allowed; case remanded.

APPELLATE CIVIL.

Before Sir Lawrence H. Jenkins, K.C.I.E., Chief Justice, and Mr. Justice N. R. Chatterjea.

NAND KISHORE SINGH

v.

RAM GULAM SAHU.*

1912

April 16.

Review—Application for leave to appeal to Privy Council—Order rejecting such application, if subject of review—Interest subsequent to decree, how far can be allowed by the High Court to be calculated—Order rejecting application for review by a Court other than High Court, if appealable—Civil Procedure Code (V of 1908), s. 114, OO. XLVII and XLIII, r. 1 (v).

An order rejecting an application for leave to appeal to His Majesty in Council comes within the description of orders contemplated in s. 114 of the Code of Civil Procedure, 1908, and is subject to review.

Lutf Ali Khan v. *Asgur Reza* (1) distinguished.

The High Court should not grant leave to appeal to His Majesty in Council in cases in which the specified amount of Rs. 10,000 can only be reached by the addition of interest subsequent to the decree.

Gooroopersad Khoond v. *Juggutchunder* (2) followed.

APPLICATION for review of order on application for leave to appeal to His Majesty in Council by the defendants, third party.

The application for leave to appeal to His Majesty in Council was dismissed by Jenkins C.J. and N. R. Chatterjea, J. relying on the statement of the learned vakil for the appellant, that though the appeal to the Privy Council was valued at more than Rs. 10,000, the value of the subject matter of the original suit was less than Rs. 10,000. The present application was for

* Application for leave to appeal to His Majesty in Council, No. 22 of 1911.

(1) (1890) I. L. R. 17 Calc. 455. (2) (1860) 8 Moo. I. A. 166, 169.

1912

NAND KISHORE SINGH v. RAM GULAM SAHU.

review of the order rejecting the application for leave to appeal to His Majesty, and was made with notice to the opposite party.

Dr. Rashbehary Ghose (with him *Babu Khettra Mohan Sen*) took a preliminary objection that there was no precedent for such an application for review.

An order refusing or granting certificate is not a judgment, and is not appealable: *Mussamut Amirrunnessa* v. *Baboo Behary Lall* (1), *Manly* v. *Patterson* (2) and *Lutf Ali Khan* v. *Asgur Reza* (3). And if it is no judgment, no application for review lies. A Judge of the High Court when sitting in the Privy Council Department acts not really as a High Court Judge. How can the Judges here sit in review? The last mentioned case is certainly of doubtful application here. But I rely strongly on practice.

Mr. A. Caspersz (with him *Babu Upendranath Chatterji*), for the petitioner. Section 114, O. XLVII and s. 151 of the Civil Procedure Code are clearly in my favour: see also *Gopinath Birbar* v. *Goluck Chunder Bose* (4). In *Manly* v. *Patterson* (2) all that has been held is that there is no appeal.

On the merits, I contend that all that is necessary is that the "decree or final order must involve directly or indirectly some claim or question to or respecting property of *like* amount or value." This case is eminently such a case.

[N. R. CHATTERJEA J. See *Benoy Lal Roy Chowdhury* v. *Kamalapati Banerjee* (5) and *Bhugwat Sahay* v. *Rai Pashupati Nath Bose* (6).]

Dr. Rashbehary Ghose, in reply. There must be satisfactory explanation for review: *In the matter of*

(1) (1876) 25 W. R. 529.
(2) (1881) I. L. R. 7 Calc. 339, 341.
(3) (1890) I. L. R. 17 Calc. 455.
(4) (1884) I. L. R. 16 Calc. 292 n.
(5) (1911) 13 C. L. J. 505, 506.
(6) (1906) 10 C. W. N. 564.

Burramoollah v. *Nil Chand Dutt* (1). On the question of the valuation of the appeal, the law and practice are clear.

JENKINS C.J. This is an application to review an order made by us under Order XLV of the Code of Civil Procedure. By that order we rejected an application for leave to appeal to His Majesty in Council, and we did so upon this ground. The learned vakil for the applicant, one of the most experienced and eminent vakils of this Court, immediately told us that though the value of the subject matter of an appeal to His Majesty in Council was upwards of Rs. 10,000, still the value of the subject matter of the suit was not Rs. 10,000, and consequently he could not support the application. The result was, it was rejected.

It is now sought to obtain a review of this order under section 114 of the Code and Order XLVII. It is objected on the part of the respondent that no such application can be made, and for the purposes of supporting that contention our attention has been drawn to a number of decisions in which it has been held that no appeal lies under the Letters Patent from the orders of a single Judge, rejecting an application for leave to appeal to the Privy Council. Mr. Justice Wilson in *Lutf Ali Khan* v. *Asgur Reza*(2) bases this conclusion on the view that the order was not a judgment within the meaning of the Letters Patent If that be the reason why an appeal does not lie from an order of a single Judge, it affords no answer to an application for review.

Section 114 of the Code provides that a party, who is aggrieved by an order from which no appeal has been preferred or from which no appeal is allowed by the Code, may apply for a review of the judgment to

(1) (1872) 17 W. R. 484. (2) (1890) I. L. R. 17 Calc. 455.

1912

NAND KISHORE SINGH v. RAM GULAM SAHU.

JENKINS C.J.

the Court which made the order, and the Court may make such order thereon as it thinks fit. The order of rejection comes within this description, and the application for review is, therefore, within the terms of section 114. I fail to see how it can be said the order of rejection was not an order of a Civil Court; it was under Order XLV of the Code which is an act to consolidate and amend the laws relating to the procedure of the Courts of Civil Judicature.

Moreover, I would point out, in support of this, that when an application for leave is rejected by a Court other than a High Court, then under Order XLIII, rule 1 (*v*), an appeal lies from such order. I therefore can see in the Code nothing to support the view that the order of the High Court under Order XLV is not subject to review.

The next question is whether the applicant has made out a case for review.

It is now contended that the value of the subject matter of the suit in fact was Rs. 10,000 or upwards, and that there is an error apparent on the face of the record. But when the facts come to be investigated, it is conceded that even if interest be calculated not only up to the decree, but even up to the end of the six months allowed for redemption, the sum of Rs. 10,000 is not reached. In this connection I would refer to the case of *Gooroopersad Khoond* v. *Juggutchunder* (1) where it was stated that their Lordships must not, of course, be understood to intimate that the Sudder Courts are to give leave to appeal in cases in which the specified amount of Rs. 10,000 can only be reached by the addition of interest subsequent to the decree. Such cases must, in their Lordships' opinion, rest in their discretion," that is, in the discretion of the Judicial Committee. There were, therefore, grounds

(1) (1860) 8 Moo. I. A. 166, 169.

1912

NAND KISHORE SINGH v. RAM GULAM SAHU.

JENKINS C.J.

for the conclusion at which the learned vakil arrived as to the insufficiency of the value of the subject matter of the suit, and it is not made out that there is an error apparent on the face of the record or any sufficient reason for granting the review. If leave to appeal is to be obtained, it must, in the circumstances, be obtained from their Lordships of the Privy Council, and not from us.

The application must, therefore, be dismissed with costs.

N. R. CHATTERJEA J. concurred.

S. M. *Application refused.*

CRIMINAL REFERENCE.

Before Mr. Justice Holmwood and Mr. Justice Imam.

1912

April 18.

BHIKU HOSSEIN

v.

EMPEROR.*

Magistrate, jurisdiction of—Deputy Magistrate in charge of the office of the District Magistrate at head-quarters—Subordination of the Subdivisional Magistrate to such Deputy Magistrate—Power of latter after taking cognizance and examining the complainant on oath to direct a local investigation by the former—Irregularity, effect of—Power of the same to dismiss the complaint, and order the prosecution of the complainant, on evidence taken at the investigation and on th report of the Subdivisional Officer—Criminal Procedure Code (Act V of 1898), ss. 12, 202, 203, 476 and 529(f).

A Subdivisional Magistrate is not, under s. 202 of the Criminal Procedure Code, subordinate to a Deputy Magistrate, appointed to act in the district, without definition of the local limits of his jurisdiction, who was in charge of

*Criminal Reference No. 25 of 1912, by Bernard V. Nicholl, Sessions Judge of Dinajpore, dated Feb. 15, 1912.

1912

BHIKU HOSSEIN v. EMPEROR.

the office of the District Magistrate at head-quarters during the latter's absence on tour, and such Deputy Magistrate cannot, therefore, after taking cognizance of an offence committed in the subdivision, and examining the complainant on oath, direct a local investigation by the Subdivisional Magistrate, nor can he thereafter dismiss the complaint, and order the prosecution of the complainant under s. 476 of the Code on such report, and the evidence taken at the investigation.

Section 529(*f*) does not, in the circumstances, confer jurisdiction on the Deputy Magistrate to make such orders of dismissal and prosecution, but vests the Subdivisional Magistrate with seisin of the case, and the latter alone can inquire into it, and pass final orders.

ON the 27th November 1911, one Bhiku Hossein, resident of the Balurghat subdivision of the district of Dinajpore, preferred a complaint before Mr. Gyan Sankar Sen, Deputy Magistrate, with first class powers, who was then in charge of the Sudder station during the absence of the District Magistrate on tour, against Shamapodo Mukherjee, daroga of the Balurghat thana, the chota daroga, a head-constable and a constable, all of the same thana, the beat s rdar of village Tinshira, and a chowkidar, charging them with offences under sections 342 and 384 of the Penal Code committed on the 3rd instant in the subdivision. The complaint contained a rider explaining the delay and the reasons for not filing the complaint before the Subdivisional Officer. The Government Notification transferring Mr. Sen to the district only stated that the said Magistrate "is transferred to the head-quarters station of the Dinajpore district" without defining the local area of his jurisdiction as a first class Magistrate. The standing order, dated 25th April 1910, with reference to the Deputy Magistrate, was as follows:—"Mr. Sen, Deputy Magistrate, is hereby empowered to take cognizance under s. 190 (*a*) and (*b*), Criminal Procedure Code, and also to transfer cases of which he has taken cognizance under s. 192, and in the case of the District Magistrate being on tour he will remain in charge of

1912

BHIKU HOSSEIN v. EMPEROR.

my office and do the current work." Mr. Sen examined the complainant on oath under s. 200 of the Criminal Procedure Code, and recorded the following order:—"Copy of complaint to Police for information and for deputation of a superior officer for investigation along with the Subdivisional Officer of Balurghat to whom the original complaint is forwarded for enquiry." In compliance with the order, the latter examined witnesses on the 6th and 7th December, and submitted a report on the 18th stating that the case was false and recommending the dismissal of the complaint and the prosecution of the complainant. The Deputy Magistrate in charge then, on the 18th January 1912, after considering the report and the evidence taken at the investigation and after hearing the complainant's pleader, dismissed the complaint under s. 203, and, acting under s. 476 of the Code, directed the trial of the complainant for an offence under s. 211 of the Penal Code, and sent the record to the District Magistrate for orders. The complainant thereupon moved the Sessions Judge of Dinajpore for further enquiry, and the latter referred the case to the High Court, on the 18th February, under s. 438 of the Code, without calling for an explanation from the District Magistrate, recommending the reversal of the order of the Deputy Magistrate passed under s. 476. The High Court was of opinion that the District Magistrate should be called upon for a full expression of his views on the question involved on the Judge's letter of Reference, and that the law officers of the Crown should be asked to appear as the matter was one of great importance.

The District Magistrate then submitted an explanation admitting that the Subdivisional Officer was not subordinate, under s. 202 of the Code, to the Deputy Magistrate, and that the latter was not entitled to

1912

BHIKU HOSSEIN v. EMPEROR.

transfer the case to the former, but contending that the Deputy Magistrate acted *bonâ fide* under a misapprehension of the terms of Circular No. 645—49J.J., dated the 8th March 1910, of the Government of East Bengal and Assam, and the Revised Rules for enquiries into serious misconduct on the part of the police, and that the irregularity was cured by s. 529(*f*) of the Code.

The Advocate-General (*Mr. Kenrick, K.C.*, with *Mr. Monnier*), for the Crown. The Government Notification transferring the Deputy Magistrate exercising first class powers to the district of Dinajpore did not define the local limits of his jurisdiction. He, therefore, had jurisdiction, under s. 12 of the Criminal Procedure Code, throughout the district. Under the standing order, dated the 25th April, he was empowered to take cognizance under s. 190(*1*)(*a*) and (*b*), and was placed in charge of the District Magistrate's office during the absence of the latter on tour. The Deputy Magistrate had, therefore, the powers of the District Magistrate, and the Subdivisional Officer was subordinate to him within the terms of ss. 17 and 202 of the Code. The orders of the Deputy Magistrate directing a local investigation by the Subdivisional Officer, dismissing the complaint under s. 203, and directing the prosecution of the complainant under s. 476, upon the evidence taken at the local investigation, were not *ultra vires*. Assuming that the order under s. 202 was bad, the irregularity was cured by s. 529(*f*), and the subsequent orders were passed with jurisdiction.

Mr. J. N. Roy (with him *Babu Manmatha Nath Mukherjee*), for Bhiku Hossein. The orders of the Deputy Magistrate in charge are illegal on the face of them. A Subdivisional Officer is not subordinate to

him, and the latter could not, therefore, refer the complaint to the former for local investigation and report, nor dismiss the complaint on such report and evidence taken at the investigation, nor pass an order under section 476 on such materials.

HOLMWOOD AND IMAM JJ. This was a Reference made by the learned Sessions Judge of Dinajpore recommending that the order passed by the Deputy Magistrate at head-quarters, under section 476 of the Criminal Procedure Code, directing the trial of the complainant under section 211 and sending the case to the District Magistrate for orders, should be set aside. At the same time he informed us that there was a motion before him to order further enquiry into the matter. He did not think it proper to deal with it himself, because it might prejudice our order in regard to the matter under section 476 of the Criminal Procedure Code. He says it seemed to him that the proper course to take was to submit this Reference for decision before proceeding to dispose of the other motion.

We need not, therefore, go into the point of the necessity for further enquiry under section 203, as we have dealt with it in a similar case to this in a somewhat lengthy judgment delivered this morning in which we pointed out that the Government Circular with regard to enquiries into complaints against Police officers has been greatly misunderstood, that that Circular cannot be held to refer to any kind of local investigation under section 202 of the Criminal Procedure Code, and that the local investigation which it mentions is a full and complete judicial enquiry on the spot after process issued and hearing witnesses on both sides and taking the explanation of the accused person.

1912

BHIKU HOSSEIN v. EMPEROR.

It is clear that the accused person cannot be called upon for explanation nor can be called upon to produce witnesses, unless and until there is ground for issuing process against him, and the law says that if upon complaint there is ground for issuing process against him, the Magistrate shall issue summons for the attendance of the accused. That is section 204. The idea seems to have been that the Police officer might have an opportunity of defending himself and getting his accuser charged with bringing a false case without a trial, that is to say, judicial trial. Now that would be as unfair to the complainant as the converse procedure would be to the accused. We must take it that the Government intended that both sides should have full and free justice, and, therefore, when a complaint is made against a Police officer of a certain offence, under section 202, the Magistrate who entertains the complaint must either go to the spot and make enquiry himself and issue process if he finds it necessary to call upon the accused to answer to anything, or if he makes it over under section 192 to any other Magistrate of the first class, that Magistrate must be vested with full seisin of the case and must continue the enquiry up to the necessary order of discharge, acquittal or conviction, as the case may be. But that is hardly the point which the learned Judge has referred to us. This is a point which he will have to deal in the light of the remarks which we have just made.

The point which he makes is that the Deputy Magistrate at head-quarters had no power as such to transfer the investigation to the Subdivisional Officer of Balurghat, and the District Magistrate in his explanation has frankly admitted that this is so; but, as he points out, an error made in good faith is cured by section 529. Granted that this is so, this Subdivisional

Officer was vested with full seisin of the case, and he alone can enquire into it and pass final orders. But this is just what the petitioner in this case intended to avoid when he went to the District Magistrate with his complaint; and it appears to us that the reasons which weighed with the District Magistrate in allowing him to make his complaint before the officer at head-quarters are equally cogent now. Nothing has occurred since to render it the less desirable that some officer other than the local officer at Balurghat should make this enquiry. The cure of the erroneous order of transfer by section 529 would only give the Subdivisional Officer, as we have seen, jurisdiction; it could not confer jurisdiction on the Deputy Magistrate at head-quarters to recall the case to be dealt with under section 203, or pass any orders under section 476. All those orders, therefore, are *ultra vires* and without jurisdiction. Whether there should be a further enquiry into the case or not is a matter which the Sessions Judge will now no doubt have no difficulty in deciding. But we must make the Rule absolute as far as this Reference is concerned, and hold with the learned Judge that the order for prosecution under section 476 is without jurisdiction and must be set aside.

E. H. M.

APPELLATE CIVIL.

Before Sir Lawrence H. Jenkins, K.C.I.E., Chief Justice and Mr. Justice Chapman.

1912

April 19.

BASANTI LAL

v.

CHHEDO SINGH.*

Forfeiture—Insolvency—Security for production of Insolvent-debtor—Failure of insolvency application—Forfeiture of security-money—Civil Procedure Code (Act V of 1908), s. 145.

The decree-holder is entitled to the money that has been deposited by the surety as security for the benefit of the decree-holder whose rights were interfered with, to enable the judgment-debtor to make an application in insolvency with a view to his protection from arrest, on the money being forfeited by the Court for failure to produce the debtor when required.

The Court has no power to declare a forfeiture in favour of the Government.

APPEAL by the decree-holders, Basanti Lal and another, against the surety, Chhedo Singh, the judgment-debtor, Gendo Singh and the Secretary of State for India in Council.

One Chhedo Singh stood surety for the production of Chhedi Halwai, who on filing an application for insolvency was ordered to be released from civil jail. Chhedo failed to produce Chhedi on a date on which he had been directed to produce Chhedi and the security money, Rs. 500, was forfeited. The decree-holder and creditor, Basanti Lal, prayed that the amount might be declared to be forfeited to him and he might be ordered to get the money. He based his claim on the provisions of section 145 of the Code of Civil Procedure, clause (*c*), first part. The District Judge

* Appeal from Order No. 384 of 1910, against the order of S. C. Mullick, District Judge of Gaya, dated June 14, 1910.

held the section quoted above inapplicable to the case. He remarked that "Chhedo Singh did not stand surety for the payment of any money, but the production of the judgment-debtor Chhedi Halwai whenever wanted by the Court. As Chhedo failed to produce the man, the money was to be forfeited to Government and not to the creditor. The application of Basanti Lal was therefore rejected and the sum of Rs. 500 was ordered to be forfeited to Government."

The decree-holders appealed against the aforesaid order.

Babu Kshetramohan Sen, for the appellants, contended that the Court below had no jurisdiction to order the money to be forfeited to Government. The creditors at whose instance the debtor was imprisoned were entitled to get the money. as his rights were infringed.

Babu Shorashicharan Mitra (on behalf of *Babu Ramcharan Mitra, the Senior Government Pleader*), for the Secretary of State, left the matter entirely in the hands of the Court.

Babu Harihar Prasad Singh, for the surety, contended that the money should not have been forfeited at all.

[JENKINS C.J. You have not appealed against that order.]

JENKINS C.J. This I think is a very clear case; money was deposited by the surety as security for the benefit of the decree-holder whose rights were interfered with, to enable the judgment-debtor to make an application in insolvency with a view to his protection from arrest. The insolvency application failed, and so it became incumbent upon the surety to produce the debtor before the Court. This he failed to do, and, in the circumstances the officiating District

1912

BASANTI LAL v. CHHEDO SINGH.

JENKINS C.J.

Judge has determined that the sum of Rs. 500 deposited by the surety is forfeited to the Government. The Secretary of State has been represented before us, and the learned pleader tells us—I think most properly—that he leaves the matter in the hands of the Court. It is to my mind obvious that there was no power in the Court to declare a forfeiture in favour of the Government. The surety was anxious to suggest that his suretyship did not extend beyond the pendency of the insolvency proceedings. But he has not appealed from the order adjudicating upon this point adversely to him, so that we could not give effect to it, even if we thought there was merit in the contention. We must set aside the order under appeal and direct that the sum of Rs. 500 be paid to the decree-holder We make no order as to costs.

CHAPMAN J. I agree.

S. M. *Appeal allowed.*

CRIMINAL REVISION.

Before Mr. Justice Holmwood and Mr. Justice Imam

1912

April 19.

BHAGABAT SHAHA

v.

SADIQUE OSTAGAR.*

Criminal Procedure Code (V of 1898), s. 522—Restoration of immoveable property—Appellate Court, power of—Jurisdiction.

An order under s. 522 of the Criminal Procedure Code can only be made by the Court which convicts of an offence attended with criminal force. An Appellate Court has no power to make such an order restoring possession of immoveable property.

* Criminal Revision, No. 415 of 1912, against the order of H. M. Cowan, Additional District Magistrate of Dacca, dated Jan. 19, 1912.

Narayan Govind v. *Visaji* (1) referred to.

THE facts are shortly these: On the 13th of August 1911 the complainant on behalf of his master instituted a case of trespass against the petitioner and another. The accused were tried under section 448 of the Indian Penal Code by a Sub-Deputy Magistrate of Dacca. The Sub-Deputy Magistrate discharged one and convicted the other and sentenced him under section 448 of the Indian Penal Code, to pay a fine of Rs. 50, in default to suffer imprisonment for one month. Against this order the accused appealed to the Additional Magistrate of Dacca who, on the 19th of January 1912, dismissed the appeal and directed the complainant to be put in possession of the property—the subject matter of dispute.

Against this order of the Additional Magistrate the petitioner moved the High Court and obtained this Rule.

Mr. J. N. Roy and *Babu Bhupendra Chandra Guha*, for the petitioner.

HOLMWOOD AND IMAM JJ. We are of opinion that this Rule must be made absolute on the ground on which it was issued. The considerations which moved the Full Bench in the case of *Mehi Singh* v. *Mangal Khandu* (2) seem to apply with equal or even more force to an order under section 522, Criminal Procedure Code. It is clear that the confirming of a conviction on appeal where the Magistrate had not thought it necessary to act under section 522 cannot make such an order a consequential relief, or an order ancillary in character for which no separate authority is needed. Separate authority under section 522 was distinctly needed before any Criminal Court could have such extraordinary powers as are given thereby. The power

(1) (1898) I. L. R. 23 Bom. 494. (2) (1911) I. L. R. 39 Calc. 157.

1912

BHAGABAT SHAHA v. SADIQUE OSTAGAR.

is an unusual one. It is one certainly not inherent in the ordinary Courts of criminal jurisdiction, and it certainly could not be exercised by any person other than the Court which convicted of an offence attended with criminal force and held independently that by such force any person had been dispossessed of any immoveable property, and that independent finding must of course be the finding of the Court of first instance. The Appellate Court cannot come to an independent finding upon a matter which is not before it in appeal. We do not think it necessary to discuss the divergence of opinion between this Court and the Bombay Court as regards the time at which such an order should be passed, but we may say that we are not to agree with the v[illegible]s. 500 be paid to the decree-holder *Narayan Govind* [illegible]s to costs.

tion in the Appellate [illegible] may be rendered still more clear; for the Bombay Court says that an order made under section 522, Criminal Procedure Code, restoring possession of immoveable property to a person who has been dispossessed of it by criminal force is an independent order, and may therefore be made subsequent to the date of the conviction of the offender and need not be made at the same time as the conviction. If that is so, the Court which had the conviction before it on appeal obviously had nothing whatever to do with the order under section 522, and could not pass an independent order directing restoration of the property. The Rule is made absolute, and the order under section 522 set aside.

S. K. B.

Rule absolute.

(1) (1898) I. L. R. 23 Bom. 494.

APPELLATE CRIMINAL.

Before Mr. Justice Holmwood and Mr. Justice Imam.

MATI LAL CHANDRA

v.

EMPEROR.*

1912

May 1

Excisable articles—"Spirituous and fermented liquors"—Drugs containing spirituous liquor—Manufacture, sale or possession—Transport, Import or Export—Bengal Excise Act (V of 1909), ss. 46, 52, 55 and 57—Board Notifications—License—Misconduct of servant or agent.

The meaning of the Legislature in amending the Bengal Excise Act put in possession of [illegible] vendors of drugs selling of dispute. [illegible]m, and not to penalise the

Against this order of the Ad[illegible] moved the High

To be an excisable article liquor must be intoxicating liquor.

The term "spirituous liquor" is not intended to include a medicinal preparation merely because it is a liquid substance containing alcohol in its composition.

Section 55 of the Bengal Excise Act (V of 1909) refers to manufacture, sale or possession of excisable articles. It does not apply to import, transport or export.

Section 56 makes the holder of a license, permit, or pass liable for the misconduct of his servant or agent in matters of import, transport or export.

Gonesh Chunder Sikdar v. *Queen-Empress* (1) approved.

THE facts are shortly these: The petitioners, Mati Lal Chandra and another, are the nephews of one Giribala who owns a manufactory of drugs, known as the Indian Pharmacy Co. at Chandernagore.

On the 29th of August 1911 petitioner No. 2 received an order from Messrs. B. K. Paul & Co. of

* Criminal Appeal, No. 133 of 1912, against the order of E. Keays 2nd Presidency Magistrate of Calcutta, dated Jan. 26, 1912.

(1) (1896) I. L. R. 24 Calc. 157.

1912

MATI LAL CHANDRA v. EMPEROR.

Calcutta for three cases of tinctures of various sorts In consequence of this order on the 2nd of September one Tarini Charan Mukerjee, alleged by the prosecution to be the *sircar* of the Indian Pharmacy, conveyed three cases from Chandernagore to Howrah and took them to Messrs. B. K. Paul's godown and delivered them to the manager. The three cases were not opened—the prosecution story being that they were to be opened in the presence of the petitioners.

On the 5th of September the petitioners came to B. K. Paul, as they say, to discuss prices for a contract for which they were tendering, as Messrs. B. K. Paul expected to get a large order from the Government of the United Provinces or the Punjab.

While the two accused were in the godown of Messrs. B. K. Paul & Co., Mr. Wilson, an Excise officer, went there and found them sitting at a table with price lists and the three boxes of medicines, two closed and one open.

The petitioners were then put upon their trial for importing, transporting and possessing excisable articles, viz., the three cases of medicines in question.

They were convicted by the learned 2nd Presidency Magistrate of transporting excisable articles from Chandernagore to Calcutta, under section 46 of Act V of 1909, and of being in possession of excisable articles knowing the same to have been unlawfully imported under section 52 of the same Act, both read with section 55 of the Act, and sentenced, under section 57, to a fine of Rs. 1,000 each, or in default to one month's rigorous imprisonment.

Against this order the petitioners appealed to the High Court.

Mr. J. N. Roy, (with him *Babu Manmatha Nath Mukerjee* and *Babu Probodh Chandra Chatterjee*), for

the appellants. The tinctures which form the subject matter of the present charge are *bonâ fide* medicines prepared in accordance with the directions of the British Pharmacopœia; and although they may contain proof spirit, they are not "liquors" within the definition of section 2 (*14*) of Act V of 1909, and as such they are not excisable under the Act. The chief question to be considered in determining whether a substance is liquor or not is to see whether it is intoxicating. The definition says liquor means intoxicating liquor and includes, etc. A liquid to be excisable must be intoxicating, and this qualification must be read into the enumeration of all the liquids that follow in the definition of "liquor" as given in section 2 (*14*) of Act V of 1909. The definition does not include any and all mixtures of alcohol, and it has not been introduced in the new Act as a result of the decision in *Gonesh Chunder Sikdar* v. *Queen-Empress* (1), so as to bring within the purview of the Act all medicinal preparations containing alcohol and having no intoxicating powers.

The tinctures even if they come within the definition of "liquor" were taken out of the operation of the Excise Act by sections 9 (*2*) and 27 (*3*)) (*i*), so far as their importation was concerned. On account of these provisions in the Act, the articles were liable to duty (if they were at all liable) under the Indian Tariff Act. The goods in the present case were marked as "medicines" at the time of consignment; but as there was no arrangement at Chandernagore to enforce payment of duties under the Tariff Act, the duties could not be paid.

If some of the notifications passed by the Government under the Act purport to go against the definition of "liquor" as given in the Act and declare

(1) (1896) I. L. R. 24 Calc. 157.

1912

MATI LAL CHANDRA v. EMPEROR.

articles which are not intoxicating as excisable, they are *ultra vires*.

The facts of the case do not establish that the appellants had any connection with the firm known as the Indian Pharmacy, and that they were guilty of importing, transporting or possessing the goods.

Mr. P. L. Roy (with him *Babu Jotindra Mohan Ghose*) for the Crown, referred to the definition of "liquor" in the Act, and also to the notifications issued by Government under sections 90 and 52 of the Act.

All liquids consisting of or containing alcohol are "liquors" and are excisable. The substances that are enumerated in the definition are by themselves "liquors," and are so even if they are not intoxicating *Tari* which is enumerated in the definition includes unfermented juice drawn from any cocoanut, palmyra, date or other kind of palm trees: *vide* section 2 (*20*) of Act V of 1909; so that unfermented *tari*, which is not an intoxicating substance, is clearly "liquor" and as such excisable. Even denatured spirit is excisable.

After the decision in the case of *Gonesh Chunder Sikdar* v. *Queen-Empress* (1), "liquor" has been purposely defined in the Act, and its definition has been so framed as to include all and every mixture of alcohol. The new Act is intended to put a stop to the use of any alcohol without payment of Government duty. From the notifications under the Act it is clear that even *bonâ fide* medicinal preparations, if they contain spirit, are excisable.

As to importation, the articles are liable to duty both under the Excise Act and under the Tariff Act; but if the duty under the Tariff Act be actually paid, then they are not liable to duty under the Excise Act; but, as in the present case, if the duty under the Tariff

(1) (1896) I. L. R. 24 Calc. 157.

Act has not been paid, the liability under the Excise Act exists.

From the facts of the case it has been well established that the accused were connected with the firm, and that they were liable for importation, transportation and possession of the excisable articles.

Cur. adv. vult.

HOLMWOOD AND IMAM JJ. This is an appeal from the judgment and sentence of the 2nd Presidency Magistrate of Calcutta who has convicted the appellants Mati Lal Chandra and Promotho Lal Chandra of transporting excisable articles from Chandernagore to Calcutta under section 46, Act V of 1909, and of being in possession of excisable articles knowing the same to have been unlawfully imported under section 52 of the same Act, both read with section 55 of the Act, and sentenced them under section 57 to a fine of Rs. 1,000 each, or in default to one month's rigorous imprisonment.

The facts are as follows: There is a manufactory of drugs known as the Indian Pharmacy Co. situate in French territory at Chandernagore within the compound of the distillery of the French Government. This factory is ostensibly owned by a lady named Giribala Dassi, widow of the gentleman who originally started the business.

The accused persons are her nephews, and the first is a pleader at Hooghly, and the second a clerk in the office of the Director of Commercial Intelligence in Calcutta. Their family house is at Chandernagore, but they seem to habitually reside in Calcutta. For the purposes of this case we may take it on the evidence, though the appellants disputed this, that these gentlemen both have an active interest in the management of the Chandernagore business. On the 29th August 1911 the

1912

MATI LAL CHANDRA v. EMPEROR.

accused No. 2 received an order from Messrs. B. K. Paul, wholesale and retail druggists in Calcutta, for three cases of tinctures consisting of 25 one-pound bottles of each of (i) tincture of cinchona, (ii) tincture of cardamoms, (iii) spirits of nitric ether and (iv) tincture of ginger. This order is Exhibit B in the case, and is of some importance. It is headed "Indian Pharmacy," it is on a printed invoice slip of B. K. Paul and Co., and it says: "Please supply" the tinctures already mentioned, and is signed B. K. Paul and Co. admittedly by one Haridhan Nag, P. W. 2, who is manager and superintendent of the godown and signs for Messrs. B. K. Paul.

On the 2nd September, a Saturday, one Tarini Charan Mookerjee, alleged by the prosecution to be the *sircar* of the Indian Pharmacy, conveyed the three cases from Chandernagore to Howrah where they were consigned to him and took them thence in a carriage to Messrs. B. K. Paul's godown at 16, China Bazar Lane and delivered them to the manager. The same evening a letter was received from the second accused (Exhibit 2) which is also of great importance and runs as follows:— "*Re* your order of 29th August 1911. The medicines of the above order have been despatched under your instructions. Please order them to be opened and counted." Then follows an interpolation "in presence of our agent" in smaller writing and different ink, but we have no reason to doubt it is in the same hand-writing, viz., that of P. L. Chandra.

The letter goes on:—"The order of the 29th ultimo will be attached to the bill when it will be presented to you afterwards as is the custom with you and elsewhere. But it is impossible for us to attach it with our invoice, as it has never been the practice with you or anywhere. Hope you will do what is needful." From this it would appear that some message, oral or

written, had been sent by Messrs. B. K. Paul to the second accused.

On the 5th September the two accused came to B. K. Paul's shop, as they say, to discuss prices for a contract for which they were tendering, as Messrs. B. K. Paul expected to get a large order from the Government of the United Provinces or the Punjab. The correspondence seems to show it was connected with Oudh, but this is immaterial. An Excise officer saw them enter the shop and leave again for the godown at China Bazar. He informed Mr. Wilson, the Excise officer, who had long been on the look out for these Chandernagore medicine-sellers, and he went to the godown and says that he found them sitting at a table with price lists, one of which is Exhibit 1 before them, and the three boxes of medicines, two closed and one open. The letter (Exhibit 2) and the challan (Exhibit 3) and other documents (Exhibits 4 and 5) were found on the table. He made a search list (Exhibit 6) and seized all the articles. Upon this evidence the accused have been acquitted of importing excisable articles, but convicted of transporting and possessing the three cases of medicine in question.

The points raised in the appeal by the defence are (i) that these tinctures are not excisable articles, (ii) that the accused are not proprietors of the Indian Pharmacy nor its agents, (iii) that T. C. Mukerjee is not their *sircar* but the agent of Messrs. B. K. Paul, or at least became so as soon as the goods were delivered to him for conveyance to them under a completed contract of sale, (iv) that the possession proved in this case at the time of seizure is the possession of B. K. Paul and Co,, and not the possession of the accused, and (v) that to prove transport you must prove direct connection of the accused with the act of transport.

1912

MATI LAL CHANDRA v. EMPEROR.

The first point gives rise to a question of law which is of extreme difficulty and importance, but in the view we take it is not necessary to the decision of this appeal. In Act VII of 1878 (B. C.) excisable articles are defined as including spirituous and fermented liquors and intoxicating drugs as defined by this Act.

Fermented liquor includes malt liquor of all kinds, *tari*, fresh or fermented, *pachwai*, diluted or undiluted and any other intoxicating liquor which the Local Government may from time to time declare to be included in this definition.

Spirituous liquor includes any spirituous liquor imported into India or manufactured in India by any process of distillation.

Now in the case of *Gonesh Chunder Sikdar* v. *Queen-Empress* (1), Macpherson and Banerjee JJ. held that "spirituous liquor" in section 53 of the Act is not intended to include a medicinal preparation merely because it is a liquid substance containing alcohol in its composition. The case would be different if alcohol was manufactured separately for the purpose of being used in the preparation of a medicine.

They point out that the terms "spirituous liquor" is not defined in the Act. What is given as the definition of the term is, strictly speaking, no definition at all. It merely says "spirituous liquor includes, etc.," as above. But we observe that the medicinal preparation there under consideration was manufactured from *gur* or treacle mixed with other ingredients used for medicinal purposes. The Judges say the case would have been different if the accused had been found manufacturing alcohol or spirits separately for the purpose of being used in the preparation of a medicine. But

(1) 1896) I. L. R. 24 Calc. 157.

what was found to have been manufactured in that case by the processes of fermentation and distillation is not alcohol or spirit separately, but the compound substance, the medicine at once.

Again, in an unreported case the judgment in which is filed with the record before us, Criminal Revision No. 180 of 1892, O'Kinealy and Ameer Ali JJ., held that spirits of wine, sold by a chemist for medicinal purpose, was not liable under the Excise Act. They rely on section 66 of that Act, and they say that rectified spirits of wine is a drug and largely used in making up other drugs, and if a chemist sells it *bonâ fide* as a medical drug, and as a medical drug only he is not liable. In the case before us the articles are tinctures prescribed by the British Pharmacopœia and there is no doubt as to their being *bonâ fide* medicinal preparations. Now, in the new Excise Act (Ben. V of 1909), a definition of liquor has been given and "excisable article" has been defined "as any liquor or intoxicating drug as defined by or under this Act." We have nothing to do with intoxicating drugs, and have only to see what the definition of liquor is and that definition runs as follows: "Liquor means intoxicating liquor, and includes spirits of wine, spirit, wine, *tari*, *pachwai*, beer, all liquids consisting of or containing alcohol and any substance which the Local Government may by notification declare to be liquor for the purpose of this Act."

It will be observed that the only defining words in this clause are "Liquor means intoxicating liquor," and the rest of the clause is open to the observations made by the Judges in *Gonesh Chunder Sikdar's Case*.(1) That the clause covers spirits of wine which is in itself, apart from its medicinal use, a liquor which can be drunk as an intoxicating liquor there can be no

(1) (1896) I. L. R. 24 Calc. 157.

1912

MATI LAL CHANDRA v. EMPEROR.

doubt, and the decision in the unreported case we referred to above has therefore been clearly overruled. But that *Gonesh Chunder Sikdar's Case* (1) is no longer good law is not so clear. To be an excisable article liquor must be intoxicating liquor, and the enumeration of all the liquids that follow does not make them liquor unless they are intoxicating. Now, none of these drugs before us could conceivably be used as an intoxicating liquor. The poisonous drugs they contain would kill a man long before he had taken a sufficient quantity of alcohol to intoxicate him, and we can hardly think that the Legislature can have intended to penalize the use of a beneficent drug like sweet spirits of nitre which has saved the lives of thousands of children, and is the basis of all the most efficient fever mixtures in this country where malaria is the greatest scourge. The real object of this prosecution is to prevent smuggling of drugs prepared in French territory with French spirits into British territory. This can be effected under the Customs law; it is idle to urge that the Government cannot afford to keep up a Customs station, if necessary, on the French frontier.

As a matter of fact, it would be wholly unnecessary inasmuch as there is a Customs establishment at Hooghly, and the Station-master at Chandernagore, which station is in British territory, could be empowered to detain all articles exported from French territory, just as local Post-masters are empowered in respect of the parcel-post and have them examined, if suspected, to contain articles liable to duty. It so happens that the Customs duty on drugs containing alcohol is exactly the same as that levied on excisable articles. The matter being *res integra*, we should be inclined to hold that the meaning of the Legislature in amending the Act was to prevent chemists and

(1) (1896) I. L. R. 24 Calc. 157.

vendors of drugs selling intoxicating liquors or otherwise dealing with them as medicinal preparations.

It in effect says you shall not sell brandy or gin or other intoxicating spirits, because they are included in the British Pharmacopœia under the names of Spiritus Vini Gallici or Spiritus Juniperi, etc., nor shall you by merely mixing a little cinnamon or other harmless medicament with spirits, palm off an excisable article as a *bonâ fide* medicine, and as one instance you shall not sell that exceedingly dangerous intoxicant rectified spirits of wine as a medicine without a license or transport it without a permit.

The argument that unfermented *tari* is not an intoxicating liquor does not help the prosecution inasmuch as that was also an excisable article under the old Act; and as it is impossible to say when it may become intoxicating by a natural process of fermentation over which the owner has no control, the Legislature has very rightly declared it to be an intoxicating liquor from the first, as it is undoubtedly a potentially intoxicating liquor in its nature.

A rather curious argument which was adduced by the prosecution may be glanced at here, since it may be reproduced in other cases unless disposed of once for all.

This is that "juice drawn from any cocoanut" is mentioned, and the astounding argument is put forward that this refers to the milk of the cocoanut itself, whereas it is obviously to be read with the word "tree," the words being any cocoanut, palmyra, date or other kind of palm tree, and means the juice of the palm tree of whatever species and not its fruit.

A much stronger argument is derivable from the fact that "denatured spirit" is treated as an excisable article and is subject to duty under the Act. "Denatured" means effectually and permanently

1912

MATI LAL CHANDRA v. EMPEROR.

rendered unfit for human consumption. But it may be that "denatured spirit" is only excisable by virtue of the notification which makes it liquor. It certainly is not intoxicating liquor, and would not be excisable but for the special notification. Had it been necessary for the decision of this appeal to come to a finding whether all drugs *bonâ fide* prepared in accordance with the British or other recognised Pharmacopæias were excisable merely because alcohol is used in their preparation, we should have felt it our duty to refer the question to a Full Bench in this form—"Does the change in the law enacted in Act V (B.C.) of 1909 make the decision in *Gonesh Chunder Sikdar* v. *Queen-Empress* (1) no longer sound law?"

The argument that the notifications of the Board treat all spirit used in the preparation of drugs as excisable articles has no force.

If the law is as we have above indicated, those notifications would be *ultra vires* if they said that the spirit found in the prepared drugs rendered the drugs themselves excisable. But they are careful to say nothing of the kind.

In the notification under section 4 a new clause (*h*), dated 6th January 1911, says that perfumed spirits and spirits used in drugs, medicines or chemicals, whether manufactured in India or imported from foreign countries, shall be taxed (if liable to taxation) as foreign and not as country liquor.

This cannot affect the question, though it may indicate that the Board of Revenue takes a different view of the law to what we do. That this is so, is patent from a letter on the record from the personal Assistant to the Excise Commissioner pointing out in answer to a question from the Indian Pharmacy that all their tinctures are liable to excise duty when

(1) (1896) I. L. R. 24 Calc. 157.

imported into British India, unless they can prove that the spirit used is foreign liquor and has paid the full duty imposed thereon by the Indian Tariff Act or the Bengal Excise Act. But this is rather discounted by another letter from the same gentleman to the Collector of Hooghly in which he says Ipecacuanha wine and tincture of Bryonia manufactured by Motilal Chunder of Chandernagore are proved by analysis to be of a strength of 100, 38. 54 or 61, 46 N. P. and 6, 40 N. P., respectively, and that they are therefore spirits and not medicines. This seems to admit that if they were *bonâ fide* medicines, as the articles in this case admittedly are, they would not be liable.

Then there is the notification under section 19 imposing certain rates of duty upon spirit used in drugs, medicines, etc., which is Rs. 7-13 per proof gallon. This does not affect the question either. The spirits are undoubtedly excisable, but the finished drugs are apparently in the view we have expressed not so. About 3 annas 6 pies would have to be laboriously collected on each bottle of tincture after analysis, and the duty would be impossible to collect. The procedure adopted in the firm of Messrs. David Waldie, who have a manufactory of drugs similar to the French one in British territory at Serampore, has been described to us at our request by the learned counsel, Mr. P. L. Roy, for the Crown. We must here express our full appreciation of the very able and exhaustive way he dealt with the legal difficulties that arise in this case and the great help he gave us in elucidating them. It appears that the spirits used by them go up in bond, so that no Customs duty is paid, but Messrs. Waldie by arrangement with Government pay Excise duties on the finished tinctures on a declaration which Government accepts that so much spirit goes to each gallon of tincture. This arrangement is no doubt convenient

1912

MATI LAL CHANDRA v. EMPEROR.

with a large firm having a permanent location at a British excise head-quarters, but it does not show that the finished drugs are excisable articles. It only shows that by special engagement Messrs. Waldie and Co. pay the duties on the spirits used after the drugs issue from their factory, and not before as they are liable to do. Obviously, this could not be done in the case of a small retail trade or of small imports from foreign territory made at odd times.

In the latter case the Customs must intervene, and this brings us to the contention which counsel for the Crown necessarily had to make, that the decision of the learned 2nd Presidency Magistrate was erroneous when he held that the accused could not be convicted of importing. The learned Magistrate bases his contention quite rightly in our opinion on the wording of section 9, sub-section *(2)*. It is argued that the words "was liable on importation to duty" import the condition that the duty has been paid. But as the Magistrate points out, there is a clear distinction between imports and articles exported or transported. The Customs are supposed to look after imports of non-excisable articles and articles which are subject both to Customs and Excise.

If such articles escape the Customs, they can be dealt with by the Excise authorities either in transport or when an attempt is made to export them, but the Excise duty on imports does not apply to articles that are liable to a similar duty in the Customs. In other words two import duties cannot be charged, and it is not the business of the Excise to enquire whether the Customs have been paid until transport begins and the inland revenue is affected.

It is perfectly clear that these articles ought to have been dealt with by the Customs authorities; but because this was not done, the accused are not thereby

rendered liable to punishment under the Excise Act. As regards the exemptions notified under section 90 of the Act, it is clear that the Board intended to exempt only such articles as had paid duty under section 10, and wished to take powers to tax the spirit contained in tinctures which had not already paid duty. There is no doubt that such spirit can be taxed in transport or export, but that does not make the drugs excisable articles. Supposing the alcohol had been destroyed or masked by some chemical process in making the drug. It is clear from the wording of all the notifications that it is separated spirit and not the combined drug that is excisable. If, as we are inclined to hold, these drugs are not excisable articles, the Customs are the only authority that can deal with them. But assuming for the purposes of this case that they are excisable articles, we have now to see whether the present accused can be said to have transported them, and whether at the time of their seizure at 16, China Bazar Lane, they were in the possession of the accused. We think both these questions must be answered in the negative.

Section 46 says "f any person transports," and section 55 which is the section relied on to make the owner or person interested liable by implication only applies to manufacture, sale or possession. It does not apply to import, transport or export. It is section 56 which makes the holder of a license, permit or pass liable for the misconduct of his servant or agent in matters of import, transport or export, and it is not contended that the accused are the holders of licenses, permits or passes. The persons actually engaged in the transport are the manager, Sideshwar, who ordered it, and the Brahmin, Tarini Charan Mukherjee, who carried it out. It is faintly suggested that accused No. 2 might be charged with abetment

1912

MATI LAL CHANDRA v. EMPEROR.

of transport inasmuch as he took the order for the supply of the goods. But to begin with, that is not what he is charged with, nor does the act of taking an order for foreign goods constitute an abetment of their transport, though it might be an abetment of their import.

We do not think that the evidence is at all sufficient to make out that this Tarini Charan Mookerjee was a servant in the employ of the Indian Pharmacy, though he may have been a person acting on behalf of Sidheswar, the manager and of B. K. Paul & Co., as a kind of go-between in this illicit trade.

It is in evidence that this Tarini Charan Mookerjee only personally conveyed goods to B. K. Paul & Co., though he countersigned the consignment notes addressed to other firms.

Now the consignor being in French territory and not coming to the station himself to forward the goods, it is the practice of the Railway not to accept his signatures on the consignment bill, unless it is countersigned by some person who knows him. The countersignature of his own servant would obviously be of very little value to the Railway Company, and it must therefore be held that the Railway authorities regarded him as an independent witness not in the sole employ of the Indian Pharmacy. It is clear that B. K. Paul & Co. alone derived benefit from this importation without duty from the French territory. They had been carrying it on for some years, and their managers must be regarded as accomplices. We cannot therefore place any reliance on their unsupported statement that T. C. Mookerjee was the *sircar* of the Indian Pharmacy, which they aver they learnt from the accused themselves. The evidence of the Deputy Inspector of Excise, Hem Chunder Banerjee, who was employed to watch accused No. 2 and saw him in

a number of chemist's shops canvassing his wares, is clear that he does not remember any other shop than B. K. Paul's that was supplied through T. C. Mookerjee. For the same reason we cannot accept their evidence that delivery had not been taken of the goods which form the subject matter of this case, and that the price of this consignment was still under discussion and a dispute still going on as to the presentation of the bill. The evidence is half-hearted and inconsistent, and it is perfectly clear from the admissions made that the discussion of prices that Mr. Wilson found going on was with regard to the proposed tender for a large order by an up-country Government, and that accused said they could execute it at a lower rate than that quoted by other firms, or in their own price lists, if a large quantity was ordered.

Their price lists had been with B. K. Paul & Co. for years, and there is no evidence that they had ever been disputed. They had ordered the goods, had accepted them and were in possession both in law and fact. The mere presence of an agent of the seller to see that the goods are in order when opened does not keep the sale uncompleted. It is a common practice for wine merchants to indemnify their customers for bottles broken in transit, but that does not prevent the property passing to the consignee when delivery has been taken. We find on the evidence that the accused were not in possession, either actual or potential, of the incriminating articles.

That being so, the convictions and sentences must be set aside, and the fines if paid must be refunded.

S. K. B. *Conviction set aside.*

END OF VOL. XXXIX.

GENERAL INDEX

— o —

PAGE.

Abetment : *See* MAHOMEDAN LAW—BIGAMY 409

Absconding Suspect, return of : *See* SECURITY FOR GOOD BEHAVIOUR ... 456

Abwab : *See* LEASE 663

Account, suit for : *See* ADMINISTRATOR PENDENTE LITE 587

Acknowledgment—*Unstamped acknowledgment, whether acknowledgment of debt —Stamp Act (II of 1899), Sch. I, Art. 1—Evidence—Limitation Act (IX of 1908), s. 19—Stamp duty.* In an account between the parties headed "Account current," kept by the plaintiff the defendant was debited with advances made by the plaintiff, together with interest on sums due from time to time, and credited with payments made by the defendant, the balances being carried forward half-yearly. On the account being adjusted and stated, a certain sum E. & O. E. was shown due by the defendant: the plaintiff appended the words "I accept this correct," and the defendant subscribed his signature thereto. The account was continued, the said sum being carried forward, and further sums were debited to the defendant, but there were no further items of credit: *Held*, that, in the circumstances of the case, the instrument was not an acknowledgment of debt within the meaning of Art. 1 of Sch. I of the Stamp Act, and was admissible in evidence without being stamped. *Brojendra Coomar* v. *Bromomoye Chowdhrani*, I. L. R. 4 Calc. 885, *Brojo Gobind Shaha* v. *Goluck Chander Shaha*, I. L. R. 9 Calc. 127, and *Nund Kumar Shaha* v. *Shurnomoyi*, I. L. R. 15 Calc. 162, followed. GALSTAUN *v.* HUTCHISON (1912), I. L. R. 39 Calc. 789

PAGE

Acknowledgment of Debt : *See* ACKNOWLEDGMENT 789

Acquiescence : *See* CUSTOM 418

——— *See* SETTLEMENT, CONSTRUCTION OF 1

——— **of Landlord** : *See* MORTGAGE 810

Act 1857—III : *See* CATTLE TRESSPASS ACT.

Act 1859—XI : *See* SALE FOR ARREARS OF REVENUE. *See* REVENUE SALE LAW.

Act 1860—XLV : *See* PENAL CODE.

Act 1861—V : *See* POLICE ACT.

Act 1865—X : *See* SUCCESSION ACT.

Act 1870—VII : *See* COURT-FEES ACT.

Act 1870—XXI : *See* HINDU WILLS ACT.

Act 1871—I : *See* CATTLE TRESPASS ACT.

Act 1871—X : *See* EXCISE ACT.

Act 1872—I : *See* EVIDENCE ACT

Act 1872—IX : *See* CONTRACT ACT.

Act 1877—I : *See* SPECIFIC RELIEF ACT.

Act 1877—III : *See* REGISTRATION ACT.

Act 1877—XV : *See* LIMITATION ACT, 1877.

Act 1878—XI : *See* ARMS ACT.

Act 1881—V : *See* PROBATE AND ADMINISTRATION ACT.

Act 1882—IV : *See* TRANSFER OF PROPERTY ACT.

Act 1882—XIV : *See* CIVIL PROCEDURE CODE, 1882.

Act 1884—IV : *See* INDIAN EXPLOSIVES ACT.

Act 1885—III : *See* TRANSFER OF PROPERTY AMENDMENT ACT.

Act 1885—VIII : *See* BENGAL TENANCY ACT.

Act 1887—XII : *See* CIVIL COURTS ACT.

Act 1890—IX : *See* RAILWAYS ACT

Act 1894—I : *See* LAND ACQUISITION ACT.

PAGE.

Act 1897—X : *See* GENERAL CLAUSES ACT.

Act 1898—V : *See* CRIMINAL PROCEDURE CODE.

Act 1899—II : *See* STAMP ACT.

Act 1903—XV : *See* EXTRADICTION ACT.

Act 1908—V : *See* CIVIL PROCEDURE CODE.

Act 1908—VI : *See* EXPLOSIVE SUBSTANCES ACT.

Act 1908—IX : *See* LIMITATION ACT.

Act 1908—XVI : *See* REGISTRATION ACT.

Act of State—*Acts done by Government in exercise of its sovereign rights—Status of non-feudatory zamindars in Central Provinces—Withdrawal from non-feudatory zamindars, the Police, Excise, and Cattle-pounds administration—Withdrawal of other rights in wajib-ul-arz or administration paper—Police Act (V of 1861)—Excise Act (X of 1871)—Cattle Trespass Acts (III of 1857 and I of 1871)—Central Provinces Land Revenue Act (XVIII of 1881).* The plaintiffs in these appeals were members of a group of non-feudatory zamindars in the Central Provinces, whose status was in 1864 determined by the Government to be that of ordinary British subjects. When they first came by conquest or cession under British rule, the management of their estates and the judicial and administrative powers exercised by them were left in their hands as a matter of convenience or economy of administration ; and in no case were they recognised as entitled to independent powers or as possessing any soveriegn rights. In 1874 *sanads* giving them proprietory rights in the soil were granted ; but subsequently at various times the Government withdrew from them the Police and Excise administration, and also the rights they had exercised in respect of cattle-pounds ; and in 1903 they were required by the settlement officials to execute (which they did under protest) *wajib-ul-arzes* containing provisions restricting their rights in various ways which they considered prejudicial to their interests and prestige. In suits brought by them against the Secretary of State in which they complained that they had been illegally deprived of rights to which they had been indefeasibly entitled from time immemorial, and that the contents of the *wajib-ul-arzes* were in derogation of their undoubted privileges : *Held*, that in the exercise of the Police and Excise functions the plaintiffs were acting not as of right, but either by sufference or by delegation, and that the resumption of those functions by the Government was an act done by the Government in the exercise of its sovereign powers, and consequently the suits were not maintainable in the Civil Courts. The maintenance of private cattle-pounds was incompatible with the provisions of the Cattle Trespass Act ; and their establishment under the superintendence and control of Government, as being under the circumstances essential for maintenance of law and order and the peace and good government of the country, was an act of the Executive Government with which it was not competent for the Civil Court to interfere. BIR BIKRAM DEO *v.* SECRETARY OF STATE FOR INDIA (1912), I L. R. 39 Calc. 615

Administration Bond—*Letters of administration—Probate and Administration Act, 1881, ss. 78, 79, 86—Administration bond in favour of District Judge—Assignment of the bond by the District Judge—Second assignment—Appeal—Memorandum of appeal treated as petition for revision.* Under s. 79 of the Probate and Administration Act, 1881, a District Judge has no authority to assign an administration bond again to a person so long as a previous assignment of the said bond to another person is in force. No appeal lies against an order passed by the District Judge assigning a bond under s. 79 of the Act ; but where the District Judge passes an order which he has no authority to do, the High Court may interfere, treating the memorandum of appeal as an application for

PAGE.

Administration Bond—*concld.*

revision. *Uma Charan Das* v. *Muktakeshi Dasi*, I. L. R. 28 Calc. 149, discussed. KALIMUDDIN *v.* MEHARUI (1912), I. L. R. 39 Calc. ... 563

Administrator pendente lite—*Discharge, order of—Passing of accounts—Suit for account, whether subsequently maintainable—Civil Procedure Code (Act V of 1908), O XXV, r. 6.* An order discharging an administrator *pendente lite* from further acting as such upon passing his accounts, and the consequent passing of his accounts, in the circumstances of the case, did not constitute a bar to a suit for an account brought against him. KHITISH CHANDRA ACHARJYA CHOWDHURY *v.* OSMOND BEEBY (1912), I. L. R. 39 Calc. 587

Adoption : *See* CUSTOM 418

——— *See* HINDU LAW—ADOPTION ... 582

Adulteration—*Adulterated ghee, sale of—Master and servant—Sale by servant or partner—Liability therefor of master or co-partner of a firm of Commission agents—Calcutta Municipal Act (Beng. III of 1899), ss. 495 and 574.* Section 495 of the Calcutta Municipal Act imposes a positive prohibition against the sale of adulterated articles of food or drink, and covers the case of an agent or firm as well as that of a master and servant. A master is liable under the section for the sale by his servant of such adulterated articles at his shop without his connivance. The partners of a firm carrying on business as agents of the manufacturers of *ghee*, in shops bearing their names, are each responsible for everything sold therein in contravention of the section. *Brown* v. *Foot*, 17 Cox C. C. 509, followed. SEW KARAN *v.* CORPORATION OF CALCUTTA (1912), I. L. R. 39 Calc. 682

Adverse Possession : *See* LIMITATION ... 453

——— *See* SHEBAIT ... 887

Agent or Manager, acts of : *See* RIOTING ... 834

Agreement between Predecessors in title : *See* JURISDICTION 739

PAGE.

Allegorical Poem : *See* OBSCENE PUBLICATION 377

Alwan : *See* "SHAWLS," MEANING OF ...1029

Amendment, successive applications for : *See* DECREE, AMENDMENT OF 265

Ancient Lights : *See* EASEMENT ... 59

Anumatipatra, construction of : *See* HINDU LAW-ADOPTION 582

Apostacy : *See* MAHOMEDAN LAW—BIGAMY 409

Appeal : *See* ADMINISTRATION BOND ... 563

——— *See* COURT-FEE 906

——— *Land Acquisition—"Award"—Refusal to restore claim-case, if an award—Land Acquisition Act (I of 1894), s. 54.* An order of the Special Land Acquisition Judge, refusing to restore a claim-case by setting aside a decree passed *ex parte* for default of the claimant, is not an "award" and does not come under s. 54 of the Land Acquisition Act. An appeal does not, therefore, lie against such an order. HASUN MOLLA *v.* TASIRUDDIN (1911), I. L. R. 39 Calc. ... 393

———**Committee** : *See* MUNICIPAL ASSESSMENT 141

———, **dismissal of, for default** : *See* DECREE 341

——— **right of** : *See* ARBITRATION ... 822

——— **right of Municipal election** ... 754

Appeal to Privy Council—*Limitation—Period between the signing of the judgment and the decree, how far allowed to be calculated in saving limitation in filing Privy Council Appeal—Limitation Act (IX of 1908), ss. 5, 12, Sch. I, Art. 179.* Where the appellant to His Majesty in Council has failed to apply for a copy of the judgment and decree within the period allowed for filing the appeal, he cannot be allowed to say that he was prevented from filing the application in time by reason of the decree not being signed : and he is not entitled to ask the Court under s. 12 of the Limitation Act to deduct the period between the signing of the judgment and the

PAGE.

Appeal to Privy Council—*concld.*

signing of the decree in computing the period of limitation for appeal to His Majesty in Council. *Bechi* v. *Ashan-ullah Khan.* I. L. R. 12 All. 461, relied on. *Beni Madhub Mitter* v. *Matungini Dassi*, I. L. R. 13 Calc. 104, distinguished. HARISH CHANDRA TEWARY *v.* CHANDPUR COMPANY, LD. (1912), I. L. R. 39 Calc. ... 766

Appellate Court, power of : *See* COMPENSATION 157

——— *See* RESTORATION OF IMMOVEABLE PROPERTY ...1050

———, **to alter findings :** *See* RIOTING 896

Appropriation : *See* RE-SALE ... 568

Arbitration : *See* STAMP-DUTY .. 669

Arbitration—*Award—Decree following award—Appeal, right of—Civil Procedure Code (Act V of 1908), Second Schedule, rules 15 & 16—Letters Patent of 1865, clause 15.* Where an application to set aside an award on the ground that it was made after the expiration of the period allowed by the Court has been refused, and subsequently judgment has been given according to the award, no appeal lies from such judgment on the same ground whether under the Letters Patent or under the Code of Civi Procedure. SHIB KRISTO DAW & Co. *v.* SATISH CHANDRA DUTT (1912), I. L. R. 39 Calc. 822

Arms Act (XI of 1878), s. 25 : *See* TRESPASS 953

Arrest : *See* HABEAS CORPUS ... 164

Articles of Association : *See* MORTGAGE ... 810

Assessment, principle of : *See* MUNICIPAL ASSESSMENT 141

Assessors, opinion of : *See* MAGISTRATE ... 119

Assignment : *See* ADMINISTRATION BOND ... 563

Attachment : *See* GHATWALI TENURE ...1010

——— *See* JALKAR 469

Attestation : *See* USUFRUCTUARY MORTGAGE 227

Auction-purchaser : *See* PARTIES ... 687

Award : *See* APPEAL 393

PAGE.

Award—*concld.*

——— *See* ARBITRATION 822

——— *See* COURT-FEE 906

Bengal Act, 1868—VII : *See* SALE FOR ARREARS OF REVENUE 981

Bengal Cess Act (IX of 1880), s. 95 : *See* ROAD-CESS RETURNS 1005

——— *See* TEISHKHANA PAPER 995

Bengal Chamber of Commerce, arbitration by : *See* STAMP-DUTY 669

Bengal Excise Act (V of 1909), ss. 46, 52, 55, 57 : *See* EXCISABLE ARTICLES ...1053

Bengal Municipal Act (Ben. III of 1884), ss. 85, 114 : *See* MUNICIPAL ASSESSMENT 141

Bengal Tenancy Act (VIII of 1885), s. 48 : *See* UNDER-RAIYAT 839

——— **s. 49, cl. (b) :** *See* UNDER-RAIYAT ... 278

——— **s. 160 (g) :** *See* LANDLORD AND TENANT 138

Board Notifications : *See* EXCISABLE ARTICLES 1053

Bought and Sold Notes : *See* STAMP-DUTY 669

Breach of the Peace, likelihood of : *See* DISPUTE CONCERNING LAND ... 150

Building—"*Re-erection*"—*Renewing or repairing a roof replaced on its former site—Reconstruction not exceeding one-half its cubical extent—*"*Building*," *whether a shed with posts and tin roof is a—Building-line of a road, encroachment on—Calcutta Municipal Act (Beng. III of 1899), ss. 3 (3), (39) (a), 351, 449.* The removal of an old roof of a shed consisting of posts and the replacing on the same site either of a new roof or the former one after repairs, without an alteration exceeding one-half its cubical extent, is not a "re-erection" within s. 3 (*39*) (*a*) of the Calcutta Municipal Act. The offence of infringing on a building line within the meaning of s. 351 is, having regard to the definition in s. 3 (*3*),

PAGE.

Building—*concld.*

the erection or re-erection of the wall of a building within that line, and not the removal of an old roof and replacing it on the same site. TRIPENDESWAR MITTER *v.* CORPORATION OF CALCUTTA (1911), I. L. R. 39 Calc. 84

Burmese Law—*Marriage—Mutual Consent—Repute as evidence of marriage—Polygamy—Marriage with sister of living wife—Wives living in separate houses—Social status of after-married wife, evidence as to—Effect of recognition of wife—Evidence of reputation.* No ceremony of any kind is essential to a marriage among Burmese. Mutual consent is all that is required; and in the absence of direct proof consent may be inferred from the conduct of the parties or established by reputation. In Burma polygamy is lawful, as also is marriage with the sister of a living wife, as well as with a deceased wife's sister. The title of the respondent (plaintiff to share in the property of a deceased Burman, a twinzayo or hereditary oil-well owner, depended on proof that she was his lawful wife, as to which the Courts in Burma differed, the Appellate Court finding on the evidence that she was. At the time of the alleged marriage, the plaintiff was a widow with children, and the deceased was the husband of the defendant, her elder sister, with whom after the marriage she remained on good terms though for convenience, both having families, they lived in separate houses, at which the husband took his meals, to a far greater extent, however, at the house of the defendant than at that of the plaintiff: *Held*, that there was abundant evidence that the plaintiff was recognised as the wife of the deceased. None of the witnesses said she occupied a dishonourable or inferior position, and it was difficult to see how there could be any question of social inferiority. The Courts regarded the evidence from different standpoints; but whether the particular testimony on which they differed was accepted or not, there was very

PAGE.

Burmese Law—*concld.*

little contradiction in the evidence. On the whole the appellants had not made out a sufficient case for disturbing the judgment of the Judicial Commissioner. MI ME *v.* MI SHWE MA (1912), I. L. R. 39 Calc. ... 492

Calcutta Municipal Act (Beng. III of 1899), ss. 3 (3), (39) (*a*), 351, 44.: *See* BUILDING 84

ss. 37, 38; Sch. IV, rr. 9, 10: *See* MUNICIPAL ELECTION 754

ss. 494, 574: *See* ADULTERATION ... 682

Sch. IV, rr. 8, 9: *See* MUNICIPAL ELECTION 598

Calcutta Police Act (Beng. IV of 1866 as amended by Beng. III of 1897), s. 44: *See* COTTON-GAMBLING 968

Cancellation: *See* GIFT 933

Carriers—*Railway Company—Delivery of goods—"Clear receipt" by consignee—Loss of goods—Liability of Company for the loss.* Certain bales of cloth tendered to the East Indian Railway Company for transit were in due course delivered to the consignee, who granted "clear receipt" for them. Subsequently, the consignee discovered that some pieces of cloth out of the bales were missing, the same having been lost while in the custody of the Railway Company. In a suit brought by the consignee for compensation: *Held*, that the grant of "clear receipt" and acceptance of delivery do not affect the right to compensation for loss or damage proved to have been caused to the goods while in the custody of the carriers. *Per* MOOKERJEE J. A receipt acknowledging a delivery of the goods in good condition is only *primâ facie* evidence of the fact, and raises a presumption in favour of the carrier, which may be rebutted by the consignee. *Per* CARNDUFF J. A bailer who, in the absence of any agreement on the subject, has given the bailee a receipt for the goods

PAGE

Carriers—*concld*

bailed, is not, *ipso fac o*, precluded from proving that the goods were in reality damaged or deficient in quantity when delivered to him. EAST INDIAN RAILWAY COMPANY *v.* SISPAL LAL (1911), I. L. R. 39 Calc. 311

Cattle Trespass Acts (III of 1857 and I of 1871): *See* ACT OF STATE ... 615

Causing death by rash or negligent act—*Administering of a love-potion without knowledge of, or inquiry into, its actual contents—Penal Code (Act XLV of 1860), s. 304A—Statement by accused, when the only evidence in the case, and relied on by the prosecution—Evidentiary value of such statement.* If a person intentionally commits an offence, and consequences beyond his immediate purposes result, the result is not to be attributed to mere rashness: if knowledge cannot be imputed, still the wilful offence does not take the character of rashness because its consequences have been unfortunate, but acts probably or possibly involving danger to others, which in themselves are not offences, may be offences within section 304A and kindred section if done without due care to guard against dangerous consequences. *Reg.* v. *Nidamarti Nagabhusanam*, 7 Mad. H. C. 119. *Empress* v. *Ketabdi Mundul*, I. L. R. 4 Calc. 764, followed. Where the only evidence of an offence is a statement by the accused, and it is relied on by the prosecution as evidence thereof, it must be taken as a whole, and nothing can be read into it which is not contained therein. PIKA BEWA *v.* EMPEROR (1912), I. L. R. 39 Calc. 855

Central Provinces Land Revenue Act (XVIII of 1881): *See* ACT OF STATE ... 615

Ceremonies of Assertion, power to perform: *See* MAHOMEDAN LAW—PRE-EMPTION 915

Ceremony: *See* BURMESE LAW—MARRIAGE 492

Charge: *See* RIOTING 781

——, **cancellation of:** *See* JURISDICTION OF MAGISTRATE 885

PAGE

Chota Nagpur Tenancy Act (Beng. VI of 1908), ss. 87, 224, 264: *See* SECOND APPEAL 241

Civil Courts Act (XII of 1887), ss. 21, 22: *See* SANCTION FOR PROSECUTION ... 774

—— **Procedure Code, 1882, s. 13, expl. (2):** *See* MORTGAGE 527

—— **(XIV of 1882), ss. 73, 206:** *See* DECREE, AMENDMENT OF ... 265

—— **ss. 244, 278:** *See* EXECUTION OF DECREE ... 298

—— **ss. 287, 291:** *See* SALE IN EXECUTION OF DECREE 26

—— **s. 311:** *See* PARTIES 881

—— **ss. 311, 312:** *See* SECOND APPEAL ... 687

—— **ss. 551, 577, 586:** *See* MORTGAGE ... 925

—— **s. 575:** *See* SALE FOR ARREARS OF REVENUE ... 353

Civil Procedure Code (Act V of 1908), s. 2, sub-s. (2); O. XLI, r. 17: *See* DECREE 341

——, **ss. 24 (1) (a), 115:** *See* SANCTION FOR PROSECUTION 774

——, **s. 92:** *See* TRANSFER 146

——, **s. 98 (2):** *See* SALE FOR ARREARS OF REVENUE 353

——, **s. 100:** *See* SECOND APPEAL 241

——, **s. 114, O. XLVII, XLIII, r. 1(v):** *See* REVIEW 1037

——, **s. 115:** *See* HIGH COURT, JURISDICTION OF 473

——, **s. 145:** *See* FORFEITURE 1048

——, **O. XIV, r. 6:** *See* ADMINISTRATOR PENDENTE LITE 587

——, **OO. XX, r. 12 (2); XXI, r. 102, and XXII, r. 10; and s. 2 (11):** *See* MESNE PROFITS 220

PAGE.

Civil Procedure Code (Act V of 1908)—*concld.*

———————————, O. XXI, r. 46 : *See* PROHIBITORY ORDER ... 104

———————————, Sch. II, rr. 15, 16 : *See* ARBITRATION ... 822

Clear Receipt " : *See* CARRIERS ... 311

Clerical Mistake : *See* DECREE, AMENDMENT OF 265

Coal Mines, grant of : *See* DIGWARI TENURE 696

Coal, wrongful removal of : *See* JURISDICTION 739

Cognizance of Offence : *See* MAGISTRATE 119

Commission Agents, liability of : *See* ADULTERATION 682

Common Gaming-house : *See* COTTON-GAMBLING 968

Common Object : *See* RIOTING ... 781

——————— (not unlawful) : *See* RIOTING 896

Company : *See* MORTGAGE 810

Compensation : *See* LAND ACQUISITION ... 33

——————— : *See* SHEBAIT ... 33

——————— : *Appellate Court, power of—Criminal Procedure Code (V of 1898), s. 250—Consequential or incidental order.* An Appellate Court has no power to order compensation under section 250 of the Criminal Procedure Code. MEHI SINGH *v.* MANGAL KHANDU (1911), I. L. R. 39 Calc. ... 157

Complaint : *See* MAGISTRATE ... 119

Condonation : *See* DIVORCE 395

Conduct causing injury to health : *See* DIVORCE 395

Consent of Government : *See* MAGISTRATE 119

Consequential or Incidental Order : *See* COMPENSATION 157

Consequential Relief, prayer for : *See* COURT-FEE 704

Contract : *See* PRINCIPAL AND AGENT ... 802

——————— : *Sale of goods—Goods not appropriated—Re-sale, power of, in contract—Measure of damages.* The plaintiffs contracted to sell 750 tons of sugar at an agreed price for delivery in equal instalments from August

PAGE.

Contract—*concld.*

to December 1910 under an agreement which contained the following term : "The goods to be at the buyer's risk and peril from the time of landing of the sugar until they be removed from jetty, dock, ghât or godown ; and should the buyers fail to take delivery of the sugar, the sellers will have the option of re-selling the same in the open market by private sale or by public auction and hold the buyers responsible for all consequences." The defendants failed to take delivery of 125 tons under the August shipment. The goods remained in bulk and were never ascertained or even appropriated for the purposes of the agreement. After notice to the defendants the plaintiffs purported to dispose of the goods under the power of re-sale provided in the agreement and brought an action for the recovery of damages estimated on the basis of such re-sale : *Held*, that as the goods had not been ascertained or even appropriated for purposes of the agreement, they did not come within the power of re-sale as framed, and the "re-sale" was inoperative as a method of measuring damages : *Moll Schutte & Co.* v *Luchmi Chand*, I. L. R. 25 Calc. 505, distinguished. *Semble* : A power of re-sale in a contract can be so framed as to operate on goods even before appropriation. Inasmuch as the claim for damages was based on re-sale in the circumstances of the case, no decree could be made for damages on the basis of the difference between the contract and market rates. ANGULLIA & Co. *v.* SASSOON & Co. (1912), I. L. R. 39 Calc. ... 568

———————Act (IX of 1872), ss. 230 (2), 236 : *See* PRINCIPAL AND AGENT ... 802

Contract by Minor for purchase of immovable property : *See* SPECIFIC PERFORMANCE 232

———————, variation of : *See* SALE FOR ARREARS OF REVENUE : 98

Copy of Document proved in Foreign Court : *See* HABEAS CORPUS 164

PAGE.

Copy of Judgment : *See* PRIVY COUNCIL—APPLICATION FOR LEAVE TO APPEAL ... 510

Co-sharers : *See* MAHOMEDAN LAW—PRE-EMPTION 915

Costs : *See* EASEMENT 59

—— : *See* "SHAWLS," MEANING OF ...1029

Cotton-gambling—"*Gambling*" *and* "*Wagering*," *distinction between*—*Calcutta Police Act* (*Beng. IV of 1866 as amended by Beng. Act III of 1897*), *s. 44*—*Common gaming-house*—*Instruments of gaming*—*Cotton-gambling not a game of contest.* Betting must always be on an uncertain event, and betting in itself, apart from stakes being laid on a particular game or instrument of gaming in a public place, is not penal. Playing with cards, dice or money is penal if done in a public place. The offence as created by the Calcutta Police Act is a purely technical one, and nothing has ever been done on this side of India to include any form of betting or wagering without instruments in the offence, except in the single case of rain-gambling without a machine ; and in order to include this, extraordinary legislation has had to be undertaken to make the books and registers in which rain-gambling wagers are entered and all other documents containing evidence of such wagers instruments of gaming. Gaming is playing at any game, sport, pastime or exercise, lawful or unlawful, for money or any other valuable thing which is staked on the result of the game, *i.e.*, which is to be lost or won according to the success or failure of the person who has staked. *Reg.* v. *Ashton* 1 El. & Bl. 286, *Lockwood* v. *Cooper*, [1903] 2 K. B. 428, referred to. Wagering which includes betting is making a contract on an unascertained event past or future (in which the parties have no pecuniary interest other than that created by the contract) by which the parties are to gain or lose according as the uncertainty is determined one way or the other. *Carlill* v. *The Carbolic Smoke Ball Co.*, [1892] 2 Q. B. 484, referred to. Cotton-gambling is

Cotton-gambling—*concld.* PAGE.

"betting" pure and simple. *Hari Singh* v. *Jadu Nandan Singh*, I. L. R. 31 Calc. 542 ; 8 C. W. N. 458, referred to. RAM PRATAP NEMANI *v.* EMPEROR (1912), I. L. R. 39 Calc. ... 968

Court-fee—*Court-fees Act* (*VII of 1870*), *s. 8* and *Sch. II*, *Art. 17*, *cl. vi*—*Land Acquisition Act* (*I of 1894*), *s. 32*—*Land Acquisition Judge*, *order of*—*Appeal*—*Debutter property*—*Memorandum of appeal*—*Ad valorem fee*—*Award.* A certain *debutter* property having been acquired under the Land Acquisition Act, the compensation money allowed by the Collector was deposited in Court. One *T* applied to withdraw that amount on the ground that she was entitled to it as executrix to the will of her late husband. On objection by one *K* that the money in deposit should be invested in Government securities and only the interest should be paid over to the *shebait*, the Land Acquisition Judge passed an order under section 32 of the Act directing the payment of interest only to the applicant. Against this order *T* preferred an appeal to the High Court on a court-fee stamp of ten rupees only : *Held*, that the case came under the provisions of section 8 of the Court-fees Act, and an *ad valorem* court-fee ought to have been paid. *Sheorattan Rai* v. *Mohri*, I. L. R. 21 All. 354, and *Kasturi Chetti* v. *Deputy Collector*, *Bellary*, I. L. R. 21 Mad. 269, referred to. *Held*, also, that to bring a case under the provisions of cl. vi of Art. 17 of Sch. II of the Court-fees Act, it must be established that it was not possible even to state approximately a money value for the subject-matter in dispute ; but where the claim to receive the full amount of compensation money was disallowed, and the only relief allowed by the Court was to withdraw the interest on the said money, there it was possible to state approximately the money value of the relief claimed, and therefore in such a case the provisions of Sch. II, Art. 17, cl. vi of the Court-fees Act would not apply. *Banwari Lal* v. *Daya Sunkar Misser*, 13 C. W.

PAGE.

Court-fee—*concld.*

N. 815, followed. TRINAYANI DASI *v.* KRISHNA LAL DE (1912), I. L. R. 39 Calc. 906

——— *Declaratory suit—Consequential relief, prayer for—Injunction, if consequential relief—Specific Relief Act (I of 1877), s. 42.* Section 42 of the Specific Relief Act does not sanction every form of declaration, but only a declaration that the plaintiff is "entitled to any legal character or to any right as to any property." A court-fee of Rs. 10 is not sufficient for suits that are not "declaratory suits" in the proper sense of the expression An injunction is a consequential relief. *Marsh* v. *Keith*, 1 Dr. & Sm., 342; 62 E. R. 410, followed. The law as to declaratory decrees discussed. DEOKALI KOER *v.* KEDAR NATH (1912), I. L. R. 39 Calc. 704

Court-fees Act (VII of 1870), s. 8, Sch. II, Art 17, cl. vi : *See* COURT-FEE ... 906

Court of Wards, sanction of : *See* MAHOMEDAN LAW—PRE-EMPTION ... 915

Courts (Colonial) Jurisdiction Act (37 & 38 Vict, c. 27), s. 3 : *See* HIGH COURT, JURISDICTION OF 487

Covenant : *See* MORTGAGE 828

Criminal Procedure Code (Act V of 1898), ss. 12, 202, 203, 476, 529 (*f*) : *See* MAGISTRATE, JURISDICTION OF ...1041

ss. 36, 94, 96, 105; Sch. III (8) : *See* TRESPASS 953

ss. 100, 552 : *See* MAGISTRATE, JURISDICTION OF 403

ss. 107, 145 : *See* DISPUTE CONCERNING LAND 150

ss. 107, 145, 146 : *See* JALKAR ... 469

s. 109, cls. (*a*) (*b*) : *See* SECURITY FOR GOOD BEHAVIOUR 456

s. 147 : *See* DISPUTE CONCERNING EASEMENT 560

PAGE.

Criminal Procedure Code (Act V of 1898) —*contd.*

ss. 190, 295 (*e*), 309, 530 (*k*) 531 : *See* MAGISTRATE 119

s. 195 : *See* SANCTION FOR PROSECUTION 774

s. 195 : *See* USING AS GENUINE A FORGED DOCUMENT 463

s. 213 (2) : *See* JURISDICTION OF MAGISTRATE 885

ss. 221, 223, 350 : *See* RIOTING ... 781

s. 250 : *See* COMPENSATION ... 157

s. 423 : *See* RIOTING 896

s. 437 : *See* FURTHER INQUIRY ... 238

s. 491 : *See* HABEAS CORPUS ... 164

s. 263—*Hearing and recording of evidence—Complainant and his witnesses, examination of—Procedure—Practice.* Section 263 of the Criminal Procedure Code does not excuse the Magistrate from hearing the evidence of all witnesses. In all criminal cases the complainant and such witness as he may produce must be examined, whether their evidence is required to be recorded or not, and the case must be decided upon the effect of their evidence. JABBAR SHAIK *v.* TAMIZ SHAIK (1912), I. L. R. 39 Calc. 931

s. 522—*Restoration of immoveable property—Appellate Court, power of —Jurisdiction.* An order under s. 522 of the Criminal Procedure Code can only be made by the Court which convicts of an offence attended with criminal force. An Appellate Court has no power to make such an order restoring possession of immoveable property. *Narayan Gobind* v. *Visaji*, I. L. R. 23 Bom. 494, referred to.

PAGE.

Criminal Procedure Code (Act V of 1898) —*concld.*

s. 522 : BHAGBAT SHAHA *v* SADIQUE OSTAGAR (1912), I. L. R. 39 Calc. ...1050

Cross-examination of Prosecution Witnesses: *See* CHARGE, CANCELLATION OF ... 885

Cruelty : *See* DIVORCE 395

Custom : *See* KUNJPURA, STATE OF, SUCCESSION TO 711

——— *Inheritance—Customary law of the Punjab—Sheikh Ansaris, tribe of—Gift by father to daughter—Estate taken by donee—Evidence and proof of custom—Acquiescence and consequent estoppel—Partition by agreement of parties as acquiescence in title of allottees—Limitation Act (XV of 1877), Sch. II, Art. 118—Ineffective adoption—Mahomedan Law.* The appellants claimed possession of the property in suit on the allegation that it was ancestral property to which they were entitled as reversioners. The defence was that the respondent was in possession under a gift from the last owner, a Mahomedan lady, who had adopted him as her heir, and who had herself received the property in Dispute as a gift from her father in lieu of her mother's dower ; and that the suit was barred by limitation. The parties were Sheikh Ansaris of a Pathan tribe of Punjab Mahomedans ; and the appellant's case was that according to a custom prevailing in the family no woman could take by gift a greater interest in ancestral property than an estate for life, and without power of alienation, and that the gift to the respondent was therefore void. In dismissing the appeal from the Chief Court of the Punjab : *Held*, by the Judicial Committee, on the documentary evidence as to the course of litigation concerning the property, and the circumstances connected with its devolution since 1847, and on the other evidence in the case, that not only had no such custom as alleged, applying to the family, been proved, but the evidence relating to the devolution of the property was inconsistent

Custom—*concld.* P

with the existence of such a custom, and in fact disproved it : nor was it supported by evidence as to the limited rights by custom of a widow in her deceased husband's property, nor by evidence of a custom preventing a Mahomedan father from giving his property to one son to the exclusion of another. *Held*, also, that there was strong evidence of the appellant's acquiescence in the respondent's title in the fact that in 1895-96 the principal lands which had been held in undivided shares by the parties were by agreement partitioned, each having allotted to him lands which represented his share ; and that the respondent's share on the partition represented lands which had come to him from the gift which the appellants now disputed as being void. *Semble :* That the omission to bring, within the period prescribed by Article 118 of Schedule II of the Limitation Act (XV of 1877), a suit to obtain a declaration that an adoption was invalid or never in fact took place, was no bar to a suit like the present for possession of property. *Tirbhuwan Bahadur Singh* v. *Rameshar Bakhsh Singh*, I. L. R. 28 All. 727 ; L. R. 33 I. A. 156, followed. Under the general Mahomedan law an adoption cannot be made ; and even if it be made, can carry with it no right of inheritance. MUHAMMAD UMAR KHAN *v.* MUHAMMAD NIAZ-UD-DIN KHAN (1911), I. L. R. 39 Calc. ... 41

Customary Law of Punjab : *See* CUSTOM ... 41

Customary Right : *See* MAHOMEDAN LAW—PRE-EMPTION 91

Dacoity, preparation to commit : *See* MAGISTRATE 11

Damage : *See* EASEMENT 5

Damages, decree against father for : *See* HINDU LAW—FATHER'S DEBT ... 86

Damages, measure of : *See* CONTRACT ... 56

Damages, suit for : *See* "SHAWLS," MEANING OF 102

Debutter : *See* LAND ACQUISITION ... 5

PAGE.

Debutter Property : *See* COURT-FEE ... 906

Declaration of Value : *See* RAILWAYS ACT (IX OF 1890), s. 75 1029

Declaratory Suit : *See* COURT-FEE ... 704

Decree : *See* SHEBAIT 887

———. *Order dismissing an appeal for default—Appeal from such an order—Civil Procedure Code (Act V of 1908), s. 2, sub-s. (2); O. XLI, r. 17.* An order dismissing, for default, an appeal under Order XLI, rule 17 of the Code of Civil Procedure is not a "decree" within the meaning of s. 2 of the Code, and as such is not appealable. *Radha Nath Singh* v. *Chandi Charan Singh*, I. L. R. 30 Calc. 660, *Ram Chandra Pandurang Naik* v. *Madav Purushottam Naik*, I. L. R. 16 Bom. 23. *Pohkar Singh* v. *Gopal Singh*, I. L. R. 14 All. 361, referred to. RUKMINIMAYI DASI *v.* PARAN CHANDRA BHERA (1910), I. L. R. 39 Calc. 341

Decree, amendment of—*Clerical or arithmetical mistake—Whether successive applications for amendment of decree maintainable—Civil Procedure Code (XIV of 1882), ss. 13, 206—Inherent power of Court.* A Court is competent to entertain successive applications for amendment of clerical or arithmetical mistake in a decree, or of error arising therein from any accidental slip or omission. Such applications for amendment of a decree are not barred by the rule of *res judicata*. But if an application for amendment has been heard and disposed of on the merits, a subsequent application may not be maintained in the same matter, and it may be barred upon general principles of law. The power to amend a decree so as to correct a clerical or arithmetical mistake therein, or an error arising from an accidenta slip or omission, is inherent in every Court and may be exercised at any time the error is discovered, although the Court cannot exercise such power unless the error is of the description mentioned in section 206 of the Code of 1882. LANGAT SINGH *v.* JANKI KOER (1911), I. L. R. 39 Calc. 265

PAGE.

Decree, form of : *See* EASEMENT ... 59

Decree for Money : *See* EXECUTION OF DECREE 298

Decree in Foreclosure : *See* MORTGAGE ... 925

Decree of Appellate Court : *See* MORTGAGE 925

Defence, opportunity of : *See* HABEAS CORPUS 164

Delivery of Goods : *See* CARRIERS ... 311

Depositon taken in absence of Accused : *See* HABEAS CORPUS 164

Deputy Magistrate in charge of the District : *See* MAGISTRATE, JURISDICTION OF ...1041

Digwar, position of : *See* LANDLORD AND TENANT 696

Digwari Tenure : *See* LANDLORD AND TENANT 696

Discharge, order of : *See* ADMINISTRATOR PENDENTE LITE 587

Dismissal of appeal for default : *See* DECREE 341

Dispute concerning Easement—*Right of passage of surplus water through an āl—Jurisdiction of Magistrate to direct an opening in the āl to be made by a party, and, on failure, by the Police—Criminal Procedure Code (Act V of 1898) s. 147.* The Magistrate has jurisdiction, under section 147 of the Criminal Procedure Code, on being satisfied that a party has a right to have an opening in an *āl*, for the purpose of draining off the surplus water from his lands, and that he has exercised the right for several years, and also on the last occasion, when it was exercisable, to pass an order requiring the opposite party to make the opening within a reasonable time from its date, and on his failure to do so, directing the Police to make the same : *Dowlat Koer* v. *Siva Pershad Pandit*, 12 Ind. Cas. 615. *Pasupati Nath Bose* v. *Nanda Lal Bose*, 5 C. W. N. 67, and *Lalit Chandra Neogi* v. *Tarani Pershad Gupta*, 5 C. W. N. 335, followed. *Dalmir Puri* v. *Khodadad Khan*, I. L. R. 36 Calc. 923, distinguished.

PAGE.

Dispute concerning Easement—*concld.*

In re Lindsay, I. L. R. 4 Mad. 121, not followed. AMBICA PRASAD SINGH *v.* GUR SAHAY SINGH (1912), I. L. R. 39 Calc. 560

Dispute concerning Jalkar : *See* JALKAR 469

Dispute concerning Land—*Likelihood of breach of the peace—Jurisdiction of Magistrate—Criminal Procedure Code (V of 1898), ss. 107, 145.* There is no conflict between ss. 107 and 145 of the Criminal Procedure Code. The fact that there is a dispute concerning land, likely to cause a breach of the peace, does not deprive a Magistrate of jurisdiction under s. 107 of the Criminal Procedure Code, where he is informed that any person is likely to commit a breach of the peace or disturb public tranquility, or to do any wrongful act that may probably occasion a breach of the peace or distrub the public tranquility. Whether, after proceeding under s. 107 of the Criminal Procedure Code, it will be proper for a Magistrate to act under s. 145 of the Code, must depend on the circumstances of each case as it arises, viz., whether likelihood of a breach of the peace continues or not. The competence of the Magistrate to proceed under s. 107 of the Code against persons not in possession must depend upon whether as against those persons the conditions specified in the section have been established. EMPEROR *v.* ABBAS (1911), I. L. R. 39 Calc. 150

Disqualified Proprietor, Manager of : *See* MAHOMEDAN LAW—PRE-EMPTION ... 915

District Judge, power of : *See* TRANSFER ... 146

District Magistrate, jurisdiction of : *See* FURTHER INQUIRY 238

Divorce—*Condonation of incestuous adultery—Cruelty, degree of, necessary to revive condoned adultery—Subsequent conduct without physical violence, causing injury to health.* Where a husband had committed incestuous adultery which the wife had condoned,

PAGE.

Divorce—*concld.*

and subsequently the husband, without actually using physical violence, was guilty of such treatment and conduct as caused the wife's health to suffer : *Held*, that such treatment amounted to cruelty, and the incestuous adultery had been revived. A lesser degree of cruelty is necessary to revive a condoned offence than to found an original charge. *Durant* v. *Durant*, 1 Hag. Eccl. Rep. 733, *Bramwell* v. *Bramwell*, 3 Hagg. Eccl. Rep. 618, *Cooke* v. *Cooke*, 3 Sw. & Tr. 126, *Ridgway* v. *Ridgway*, 29 W. R. (Eng.) 612, approved and followed. THOMPSON *v.* THOMPSON (1911), I. L.R 39 Calc. 3

Document, varing terms of Lease : *See* REGISTRATION 2

Drugs : *See* EXCISABLE ARTICLES ...10

Easement—*Light and air—Ancient lights, infringement of—Limitation Act (IX of 1908), s. 26, scope of—Nuisance—Measure of right—Previous enjoyment—Interlocutory Injunction, technical breach of—Inquiry as to damage refusal of—Form of decree—Costs.* An action for the infringement of the easement of light and air is founded not on trespass, but on nuisance. To amount to an actionable nuisance, the interference, in the case of a house suitable for residence and business purposes, where the selling and letting value has not been diminished, must cause a sensible privation of light and air, sufficient to render the occupation of the house uncomfortable and to a sensible degree less fit for the purposes of business. In an action for infringement, the character of the previous enjoyment of the dominant tenement must be taken into consideration, but it does not furnish the decisive measure of the "unlawful hurt or annoyance." *Colls* v. *Home and Colonial Stores, Ld.*, [1904] A. C. 179, *Kine* v. *Jolly*, [1905] 1 Ch. 480, *Higgins* v. *Betts*, [1905] 2 Ch 210, considered *Bagram* v. *Khettra Nath Karformah* 3 B. L. R. (O. C.) 18, *Modhoo-*

PAGE.

Easement—*concld.*

soodan Dey v. *Bissonath Dey*, 15 B. L. R. 361, and *Delhi and London Bank* v. *Hem Lall Dutt*, I. L. R. 14 Calc. 839, referred to. To determine whether a nuisance has been proved, the existing state of things must be considered, but subject to the qualification that light and air coming from other sources, to which a right has not been acquired by grant or prescription, ought not to be taken into account. *Colls* v. *Home and Colonial Stores, Ld.*, [1904] A. C. 179, *Jolly* v. *Kine*, [1907] A. C. 1, and *Kine* v. *Jolly*, [1905] 1 Ch. 480, followed. PAUL *v.* ROBSON (1911), I. L. R. 39 Calc. 59

Ejectment : *See* LANDLORD AND TENANT... 903

——— *See* UNDER-RAIYAT ... 278

Encroachment : *See* BUILDING ... 84

Equitable Security : *See* MORTGAGE ... 810

Erroneous Decision on a question of law : *See* RES JUDICATA 848

Estate in common tenancy : *See* SALE FOR ARREARS OF REVENUE 353

Estoppel : *See* CUSTOM 418

——— *Non-transferable occupancy holding —Mortgage of the holding—Purchaser of the holding at private sale—subsequent lease by landlord to purchaser —Evidence (Act I of 1872), s. 115.* A person, having a raiyati interest in certain lands, mortgaged the same to to the plaintiff without the landlord's consent. Subsequently, various transfers of portions of the lands mortgaged were effected to different persons by the widow of the mortgagor. Finally, the widow sold a portion of the mortgaged lands with the consent of the landlord to one Radha Kanta Chakravarti, who after his purchase took a fresh lease of the same from the landlord at an enhanced rent on payment of a premium. A suit having been instituted by the mortgagee for recovery of the mortgage money, the widow and all the subsequent transferees, including the purchaser, were made parties. The purchaser pleaded that he was not a

PAGE.

Estoppel—*contd.*

necessary party to the suit, and that the mortgage was invalid on the ground that the raiyati right was not transferable. The District Judge having decided against him on these points, the purchaser appealed to the High Court : *Held* (COXE J. dissenting), that the purchaser claiming under a title, partly at least created by the mortgagor, was estopped from raising the plea of non-transferability of the holding. *Krishna Lal Saha* v. *Bhairab Chandra Rahat*, 9 C. W. N. ccxlviii, *Asmatunnessa Khatun Saheba* v. *Harendra Lal Biswas*, I. L R 35 Calc. 904 ; 12 C. W. N. 721, *Doe* v. *Stone*, 3 C. B 176, *Doe Vickers*, 4 Ad. & E. 78 , *Hughes* v. *Howard*, 25 Beav. 575, *Debendra Nath Sen* v *Mirza Abdul Samed Seraji*, 10 C. L. J. 150, referred to. RADHA KANTA CHAKRAVARTI *v.* RAMANANDA SHAHA (1912), I. L. R. 39 Calc. 513

———. *Rent-free tank—Sanad—No mention of rent in the sanad—Tenants making improvement by re-excavting tanks, effect of—Inference of landlord's intention to grant rent-free right.* In a suit brought by the landlord to recover possession of a tank with its banks, and in the alternative to have the lands assessed with fair rent, the defendant pleaded that the tank had been *nishar* (rent-free) from a long time by virtue of a *sanad* granted by the predecessor of the plaintiff. The *sanad* was granted in the year 1850 to re-excavate an unclaimed silted-up tank, by which the grantee was required to excavate the tank by employing earth-cutters, and the only restriction imposed was that the limits of the ancient tank were not to be exceeded. There was no provision for the payment of any rent in the present or future, and nothing was said as to the duration of the grant. The ancestor of the defendant re-excavated the tank at considerable expense, and it has been in the exclusive possession of the family of the defendant from father to son,

PAGE.

Estoppel—*concld.*

and still supplies good drinking water: *Held*, that, under the circumstances, the plaintiff was estopped from asserting that the tank with its banks should come under a new liability of which there was no indication in the previous history of the tank, and that, therefore, it could not be assessed with any rent. *Held*, *per* Chatterjee J., that, according to Hindu *shastras*, digging new tanks and re-excavation of old ones being supremely meritorius, the ancestor of the plaintiff could never have meant that the grant made by the *sanad* was a mere license; and that the defendant was entitled to hold the tank with its banks without payment of rent as long as the tank served the purpose for which the grant was made. The possession of a party basing his title on a grant, and not on adverse possession as an alternative source of title, cannot be used for any purpose other than for explaining the grant on which he relies. BIRENDRA KISHORE MANIKYA *v.* AKRAM ALI (1912), I. L. R 39 Calc. 439

Evidence: *See* ACKNOWLEDGMENT ... 789

———: *See* CAUSING DEATH BY RASH OR NEGLIGENT ACT 855

———: *See* HABEAS CORPUS ... 164

———: *See* ROAD-CESS RETURNS ...1005

———: *See* TEISHKHANA PAPER ... 995

———: *See* THUMB-IMPRESSION ... 348

Evidence Act (I of 1872): *See* HABEAS CORPUS 164

———— **ss. 3, 10, 45, 101, 135**: *See* PROBATE 245

———— **s. 21**: *See* ROAD-CESS RETURNS 1005

———— **s. 45**: *See* SEDITION 606

———— **S. 115**: *See* ESTOPPEL 513

———— **s. 132, and Proviso**: *See* THUMB-IMPRESSION ... 348

Evidence and proof of Custom: *See* CUSTOM 418

PAGE.

Evidence, hearing and recording of: *See* CRIMINAL PROCEDURE CODE (ACT V 1898), s. 263 931

Evidence of Reputation: *See* BURMESE LAW —MARRIAGE 492

Excisable Articles—"*Spirituous and fermented liquors*"—*Drugs containing spiritious liquor—Manufacture, sale, or possession—Transport, import or export—Bengal Excise Act (V of 1909), ss. 46, 52, 55 and 57—Board notification—License—Misconduct of servant or agent* The meaning of the Legislature in amending the Bengal Excise Act (VII of 1878) was to prevent chemists and vendors of drugs selling intoxicating liquors or otherwise dealing with them, and not to penalise the use of beneficent drugs. To be an excisable article, liquor must be intoxicating liquor. The term "spirituous liquor" is not intended to include a medicinal preparation merely because it is a liquid substance containing alcohol in its composition. Section 55 of the Bengal Excise Act (V of 1909) refers to manufacture, sale or possession of excisable articles. It does not apply to import, transport or export. Section 56 makes the holder of a license, permit, or pass liable for the misconduct of his servant or agent in matters of import, transport, or export. *Gonesh Chunder Sikdar* v. *Queen-Empress*, I. L. R. 24 Calc. 157, approved. MATI LAL CHANDRA *v.* EMPEROR (1912), I. L. R. 39 Calc. ...1053

Excise Act (X of 1871): *See* ACT OF STATE 615

Excise Act (Beng. V. of 1909), ss. 46 (*a*), 56: *See* MASTER AND SERVANT ... 344

Execution, evidence as to: *See* PROBATE 245

Execution of Decree: *See* GHATWALI TENURE 1010

———— *See* HINDU LAW —FATHER'S DEBT 862

———— *See* MESNE PROFITS 220

———— *See* PROHIBITORY ORDER 104

PAGE.

Execution of Decree—*concld.*

———————*Decree for money against judgment-debtor personally—Judgment-debtor in possession as shebait—Civil Procedure Code (XIV of 1882), ss. 244, 278.* If A, in execution of a decree for money against B, personally attaches and proceeds to sell properties of which B alleges that he is in possession, not in his own right, but as *shebait* of a deity to whom the properties have been dedicated, the question does not fall within the scope of section 244 of the Civil Procedure Code, but within the scope of section 278 read with section 280 of the Code. *Kuriyali* v. *Mayan*, I. L. R. 7 Mad. 255, not followed. *Punchanun Bundopadhya v. Rabia Bibi*, I. L. R. 17 Calc. 711, distinguished. KARTICK CHANDRA GHOSE *v* ASHUTOSH DHARA (1911), I. L. R. 39 Calc. ... 298

Execution Proceeding : *See* RES JUDICATA 848

Execution Purchaser : *See* PARTIES ... 881

Execution Sale : *See* PARTIES ... 881

Ex parte decree—*Application for setting aside ex parte decree—Limitation—Limitation Act (XV of 1877, Sch. II, Art. 164—Limitation Act (IX of 1908), Sch. I. Art. 164—General Clauses Act (X of 1897), s. 6.* Where the right of the judgment-debtor to make an application for setting aside an *ex parte* decree was lost under the provisions of Article 164, Schedule II of the Limitation Act of 1877, long before Act IX of 1908 was passed, the provisions of the new Limitation Act of 1908 cannot revive the right to apply for setting aside the decree. NEPAL CHANDRA ROY CHOWDHURY *v.* NIRODA SUNDARI GHOSE (1912), I. L. R. 39 Calc. ... 506

Expert Evidence : *See* PROBATE ... 245

Expert Opinion : *See* HANDWRITING, PROOF OF 606

Explosive Substances Act (VI of 1908), ss. 4(*b*), 7 : *See* MAGISTRATE ... 119

Export : *See* EXCISABLE ARTICLES ...1053

PAGE.

Extradition Act (XV of 1903), s. 3, Sub-ss. (*3*) to (*8*) and s. 4 : *See* HABEAS CORPUS 164

Extradition Proceedings : *See* HABEAS CORPUS 164

——————————— : *See* HIGH COURT, JURISDICTION OF ... 164

False evidence : *See* THUMB-IMPRESSION ... 348

Father's brother's Son : *See* HINDU LAW—SUCCESSION 319

Father's Debt : *See* HINDU LAW ... 862

Father's Liability : *See* HINDU LAW—SURETY 843

Fiduciary Relationship : *See* PURDANASHIN DONOR 933

Fishery—*Right to fishery in tidal and navigable river, how acquired—Limitation Act (XV of 1877), s. 26.* To establish an exclusive right of fishery in a tidal and navigable river, it is necessary to prove that the plaintiff's user was in assertion of a right other and higher than the general right of the public to fish. *Baban Mayacha* v. *Nagu Shravucha*, I. L. R. 2 Bom. 19, and *Narasayya* v. *Sami*, I. L. R. 12 Mad. 43, relied on. *Quare:* Whether exclusive right of fishery in such a river can be acquired by proof of mere enjoyment in the manner provided in s. 26 of the Limitation Act of 1877, without a grant from the Crown. *Arzan* v. *Rakhal Chunder Roy Chowdhury*, I. L. R. 10 Calc. 214, referred to. *Veresa* v. *Tatayya*, I. L. R. 8 Mad. 467, not followed. *Secretary of State for India* v. *Mathurabhai*, I. L. R. 14 Bom. 213, and *Nityahari Ray* v. *Dunne*, I. L. R. 18 Calc. 652, approved. ABHOY CHARAN JELIA *v.* DWARKA NATH MAHTO (1911), I. L. R. 39 Calc. 53

Foreclosure : *See* MORTGAGE ... 828

Foreign Records : *See* HABEAS CORPUS ... 164

Forfeiture : *See* LANDLORD AND TENANT 903

———————*Insolvency—Security for production of insolvent-debtor—Failure of insolvency application—Forfeiture of security-money—Civil Procedure*

PAGE.

Forfeiture—*concld.*

Code (Act V of 1908), s. 145. The decree-holder is entitled to the money that has been deposited by the surety as security for the benefit of the decree-holder, whose rights were interfered with, to enable the judgment-debtor to make an application in insolvency with a view to his protection from arrest, on the money being forfeited by the Court for failure to produce the debtor when required. The Court has no power to declare a forfeiture in favour of the Government. BASANTI LAL *v.* CHHEDO SINGH (1912), I. L. R. 39 Calc. 1048

Forged Document: *See* USING AS GENUINE A FORGED DOCUMENT 463

Fugitive Accused: *See* HABEAS CORPUS ... 164

Further Inquiry—*Power to direct further inquiry against a person not named in the complaint nor before the Court—Notice, necessity of—Criminal Procedure Code (Act V of 1898), s. 437.* The Court has no jurisdiction to direct a further inquiry, under section 437 of Criminal Procedure Code, in respect of a person who was not named in the complaint and against whom no other regular process has been issued. An order under section 437 of the Code made without previous notice to the accused is bad in law. *Giridhari Marwari* v. *Emperor*, 12 C. W. N. 822, followed. AMBAR ALI *v.* ANJAB ALI (1911), I. L. R. 39 Calc. ... 238

Future Wife, gift to: *See* HINDU LAW—WILL 87

Ganja, illegal possession of: *See* MASTER AND SERVANT 344

General Clauses Act (X of 1897), s. 6: *See* EX PARTE DEGREE 506

Ghatwali Tenure—*Attachment—Receiver, appointment of—Execution of decree.* On an application for execution of a decree, although an order directing attachment of a ghatwali estate may be erroneous, an order appointing a Receiver to receive the rents and profits of such estate is sanctioned by authority. *Udoy Kumari Ghatwalin* v. *Hari Ram Shaha*, I. L. R. 28 Calc. 483, referred to. KESOBATI *v.* MOHAN CHANDRA MANDAL (1912), I. L. R. 39 Calc. 1010

Ghee, adulterated: *See* ADULTERATION ... 682

Gift—*Purdanashin donor—Fiduciary relationship—Cancellation—Independent and competent advice - Duty of solicitor—Power of revocation—Transfer of Property (Act IV of 1882), s. 126—Costs.* Where an old illiterate *purdanashin* woman executes an improvident deed of gift in favour of a person standing towards her in a fiduciary capacity, the *onus* lies on the donee to establish not only that the donor understood the transaction, but that she was in a position to exercise a free and unfettered judgment, that the intention to give was her own voluntary act, and that she had independent and competent advice. *Huguenin* v. *Baseley*, 14 Ves. 273, *Hall* v. *Hall*, L. R. 8 Ch. App. 430, followed. *Kanai Lal Jowhari* v. *Kamini Debi*, 1 B. L. R. 31 (note), *Lyon* v. *Home*, L. R 6 Eq. 655, referred to. It is the duty of a solicitor, who acts as the sole solicitor in such a transaction, to try and protect the lady against herself, and to make all proper inquiries. A solicitor does not discharge his duty by satisfying himself simply that the donor understands and wishes to carry out the particular transaction. He must also satisfy himself that the gift is one that it is right and proper for the donor to make under all the circumstances ; and if he is not so satisfied, it is his duty to advice his client not to go on with the transaction, and to refuse to act further if the client persists. *Powell* v. *Powell*, [1900] 1 Ch. 243, *Wright* v. *Carter*, [1903] 1 Ch. 27, followed. *Coomber* v. *Coomber*, [1911] 1 Ch. 273, distinguished. In considering the validity of a deed of gift, the absence of a power of revocation is of importance, though not sufficient by itself to show that the gift is invalid. *Hall* v. *Hall*. L. R. 8 Ch. App. 430, referred to. KAMINI DASEE *v.*

PAGE.

Gift—*concld.*

KRISHNA CHANDRA MUKERJEE (1912), I. L. R. 39 Calc. 933

Gift to Daughter: *See* CUSTOM ... 118

Gift to future Wife: *See* HINDU LAW—WILL 87

Government: *See* PARTIES 696

Government, acts of: *See* ACT OF STATE ... 615

Government, order of: *See* HABEAS CORPUS 164

Government Tenures: *See* SALE FOR ARREARS OF REVENUE 981

Guardian and Manager, power of: *See* SPECIFIC PERFORMANCE 232

Habeas Corpus—*High Court, jurisdiction of—Extradition proceedings, jurisdiction of High Court in—Code of Criminal Procedure (Act V of 1898), s. 491—Indian Extradition Act (XV of 1903), s. 3 sub-ss. (3), (4), (6), (7) and (8) and s. 4, sub-s. (1)—Evidence Act (I of 1872), if exhaustive—English Extradition Act (33 and 34 Vict. c. 52), part of the lex fori—Foreign Records, authentication and admissibility of—Copy of document proved in Foreign Court, if admissible—Deposition taken in absence of accused—Evidence of offence on which Magistrate may act—Arrest, irregularity of, if vitiates proceedings otherwise regular—Magistrate, who may be chosen by Government—Government of Bengal, if can issue order on requisition made to Government of India—If such order can be ratified by Government of India—Fresh proceedings, legality of, whilst previous ones pending—Magistrate, if can record evidence after sending report to Government—Refusal of reasonable opportunity to fugitive to produce evidence, whether affects jurisdiction of Magistrate.* It must be shown clearly that a supreme right such as that to *habeas corpus*, or to directions in the nature of that writ, has been expressly (if that be possible to the Legislature) taken away. There is no such express provision in the Indian Extradition Act. The English Extradition Act did not give the right

PAGE.

Habeas Corpus—*contd.*

to *habeas corpus*. It merely declared a right which existed independently of that statute. *In re Siletti*, 87 L. T. 332; 71 L. J. K. B. 935; and *Ex parte Besset*, 6 Q. B. 481, followed. When a person appears before the High Court and says that he is illegally detained, the High Court can inquire whether the warrant for his custody was validly issued in extradition proceedings. If the provisions of the Legislature have not been carried out, the High Court can interfere, notwithstanding that the warrant has been given in extradition proceedings. *Rudolf Stallmann* v. *Emveror*, I. L. R. 38 Calc. 547, distinguished. Section 3, sub-section (6) of the Indian Extradition Act, 1903, is not a substitute for, and does not interfere with, proceedings taken under section 491 of the Code of Criminal Procedure, 1908, the provisions of which are as much binding as those of the Extradition Act. The Indian Evidence Act (I of 1872) does not contain the whole law of evidence governing this country. Under section 2, which saves certain rules of evidence, the English Extradition Act, which is applicable to this country, is part of the *lex fori*. Records, therefore, of the Berlin Court, which are authenticated in the manner prescribed by sections 14 and 15 of the English Extradition Act, can be properly admitted in evidence. A *copy* of a document (*Bill*), the *original* of which was proved in the German Court, is admissible as part of the records of the German Court. There may however be cases in which the production of the original document may be necessary for the enquiry in this country. If there is evidence before the Magistrate, the fugitive criminal cannot ask the Court to determine whether a *primâ facie* case has been properly found on such evidence. *In re Siletti*, 87 L. T. 332; 71 L. J. K. B. 935, followed. The High Court will not sit in appeal to review and weigh the evidence. It is sufficient

PAGE.

Habeas Corpus—*contd.*

that there should be some evidence of the offence upon which the Magistrate may resonably act. Any irregularity in the original arrest of the accused is immaterial, provided that the subsequent proceedings have been right. *R.* v. *Weil*, 9 Q. B. D. 701 ; 15 Cox C. C. 189, followed. The substantial question is not how the accused is brought into Court, but whether the Court which enquired into his case had jurisdiction to do so. The Government of India may issue its order to *any* Magistrate, and such Magistrate may issue a warrant, provided he is one who has jurisdiction to enquire into the crime of the nature of that for which extradition is sought. Therefore, an inquiry into the case of a fugitive criminal under arrest in Calcutta can be made by the Magistrate of Alipore, if duly authorised. An order issued under section 3, sub-section (*1*) of the Indian Extradition Act, 1903, by the Government of *Bengal* upon a requisition made to the Government of *India*, is invalid, and cannot be "ratified" by a subsequent order of the Government of *India*. Where, however, the latter order directs the Magistrate in pursuance of the former order "and of the statutory provisions in that behalf to enquire into the said case," the Government gives valid effect to its intention, and the Magistrate has jurisdiction to enquire. Under section 528 of the Code of Criminal Procedure, 1898, the District Magistrate can transfer to his own file, from that of the Deputy Magistrate, an application by the fugitive criminal for return of his property. The Magistrate making the inquiry under section 3 of the Indian Extradition Act, 1903, can initiate fresh proceedings notwithstanding proceedings taken under a previous order. When the Magistrate sends up his report to the Government of India under section 3, sub-section (*b*) of the Indian Extradition Act, 1903, he becomes *functus officio*, and renders himself

PAGE.

Habeas Corpus—*contd.*

incapable, therefore, of recording evidence that may be subsequently produced. The Legislature intended that the fugitive criminal should be given an opportunity of defence. If such opportunity is not given, it goes to the jurisdiction of the Magistrate. The enquiry, therefore, is not according to law, and the issue of the warrant is itself invalid. If the Magistrate suspected that the accused had no evidence, it is open to him to question the accused. If the latter stood on his right not to answer, the Court might draw such inference as the refusal to reply and the circumstances of the case suggested. *Per* MOOKERJEE J. The burden lies very heavily upon those who assert that a right of so much importance to the criminal as *habeas corpus*, given by the Common Law, has been taken away by implication. Section 491 of Code of Criminal Procedure, 1898, is applicable to cases under the Indian Extradition Act. *Rudolf Stallmann* v. *Emperor*, I. L. R. 38 Calc. 547, distinguished. The jurisdiction of the High Court has not been taken away merely because the Government of India has already issued a warrant for surrender under section 3, sub-section (*8*) of the Indian Extradition Act, 1903. Depositions which have not been taken in the presence of the accused may be admitted by the Magistrate : *In re Counhaye*, L. R. 8 Q. B. 410. Where there is no evidence before the Magistrate, the Court will interfere. *R.* v. *Maurer*, 10 Q. B. D. 513, approved of. The Court will not consider questions regarding evidence, unless the objection is such that if effect were given to it, there would be no evidence left upon which the order for extradition could be supported Under section 4, sub-section (*1*), the Magistrate may issue a warrant when the person to be arrested is within his jurisdiction. Section 4 merely provides a preliminary procedure. Under it an arrest may be effected before the receipt of

PAGE.

Habeas Corpus—*concld.*

the requisition mentioned in section 3, otherwise the criminal might escape. The two sections do not overlap. Under section 3, sub-section (*1*) of the Indian Extradition Act, 1903, the only Government competent to issue the order for enquiry is the Government to whom the foreign State has made a requisition. This function must be performed strictly, and cannot be delegated. Where the provisions of the statute have not been followed, the report of the Magistrate cannot afford a foundation for the order of the Government of India under section 3 of the Indian Extradition Act, 1903. *In the matter of* RUDOLF STALLMANN (1911), I. L. R. 39 Calc. 164

Handwriting, proof of: *See* SEDITION ... 606

Hereditary Office: *See* SHEBAIT ... 887

High Court, jurisdiction of: *See* HABEAS CORPUS 164

———— ———— ————*Jurisdiction of the High Court to try a Native Indian seaman for an offence committed on board a British vessel on the high seas —Stoppage of the vessel thereafter at intermediate ports—Accused brought to Calcutta in custody—Applicability of English Law to the offence and the charge, and of Indian Law to the procedure and sentence— Courts (Colonial) Jurisdiction Act (37 & 38 Vict., c. 27), s. 3—Merchant Shipping Act (57 & 58 Vict. c. 60), ss 684, 686.* The High Court of Calcutta has jurisdiction, in its Original Criminal Side, under sections 684 and 686 of the Merchant Shipping Act (57 & 58 Vict., c. 60), to try a Native Indian seaman for murder or manslaughter committed on board a British vessel on the high seas, who is brought to Calcutta under custody, notwithstanding that the vessel touched, after the commission of the offence, at intermediate ports in the course of the voyage. The offence should be tried, and the charge framed, under the English Law, but the procedure at the trial and the sentence must be regulated by the law of India. Section 3 of 37 & 38 Vict., c. 27, does not deal with the trial of the case, but with the sentence after conviction. *Queen-Empress* v. *Sheikh Abdul Rahiman*, I. L. R. 14 Bom. 227, and *King-Emperor* v. *Chief Officer of the the "Mushtari,"* I. L. R. 25 Bom. 636, dissented from. EMPEROR *v.* SALIMULLAH (1912), I. L. R. 39 Calc. 487

PAGE.

High Court, jurisdiction of—*concld.*

———— ———— ———— *Revisional jurisdiction—Error by Small Cause Court on a question of limitation—Civil Procedure Code (Act V of 1908), s. 115—Limitation.* An error by the Small Cause Court on a question of limitation, does not justify the interference of the High Court under s. 115 of the Civil Procedure Code. *Amritrav Krishna Deshpande* v. *Balkrishna Ganesh Amrapurkar*, I. L. R. 11 Bom. 488, *Sunder Singh* v. *Doru Shankar*, I. L. R. 20 All. 78, and *Amir Hassan Khan* v. *Sheo Baksh Singh*, I. L. R. 11 Calc. 6, referred to. RAMGOPAL JHOONJHOONWALLA *v.* JOHARMALL KHEMKA (1912), I. L. R. 39 Calc. ... 473

High Seas, offence committed on: *See* HIGH COURT, JURISDICTION OF ... 487

Hindu Law: *Adoption—Anumatipatra, construction of—Simultaneous or successive adoption—Preferential right of adoption of senior widow.* Where a Hindu, governed by the Bengal school of Hindu Law, had previous to his death executed an *anumatipatra* in these terms: "This *anumatipatra* for taking adopted son is executed to the following effect . . . in favour of first wife B. S. and second wife S. B. . . . I am giving permission in writing that when I shall be no more, each of my two wives shall be at liberty to adopt three sons successively, that is, one after another, and shall lead a moral life. It is also permitted that each of my wives shall live in my ancestral dwelling house with her adopted son . . . . . ": *Held*, that applying the canon of construction laid down in *Akhoy Chunder Bagchi* v. *Kalapahar Haji*, I. L. R.

PAGE.

Hindu Law—*contd.*

12 Calc. 406 ; L. R. 12 I. A. 198, the document did not contemplate simultaneous adoption by the widows, but successive adoption in accordance with the rule of law. As between co-widows, the senior, that is to say, she, whose marriage was earlier, has in general a preferential right of adoption. RANJIT LAL KARMAKAR *v.* BIJOY KRISHNA KARMAKAR (1912), I. L. R. 39 Calc. 582

———*Father's debt—Execution of decree—Decree against father for damages—Liability of son—Mitakshara Law—Immoral or illegal debt.* A decree obtained by a person for damages on account of injury done to his crops, by the obstruction of a channel through which he was entitled to irrigate his lands against one B, who was governed by the Mitakshara school of Hindu Law, could be executed on his death against his son, where it could not be said that the decree obtained was due to an act of the judgment-debtor, which was a wanton interference with the rights of the decree-holder, and that the liability imposed thereby on the judgment-debtor was an illegal or immoral debt. CHHAKAURI MAHTON *v.* GANGA PRASAD (1911), I. L. R. 39 Calc. ... 862

———*Succession—Mitakshara—Stridhan—Maiden's stridhan—Father's brobther's son—Sister—Sister's son.* Under the Mitakshara school of Hindu Law, a sister (father's daughter) and a sister's son (father's daughter's son) are entitled to succeed to a maiden's *stridhan* in preference to a father's brother's son. *Per* N. R. CHATTERJEA J. Under the Mitakshara Law, in the absence of any rule determining the nearness among relations of the father in case of succession to a maiden's *stridhan*, the question should be decided by analogy to the order of succession to the *stridhan* of a childless woman married in a disapproved form, so far as it is applicable, for in both cases the succession is confined to the father's family. The *stridhan* of a childless woman married in a disapproved form devolves, after the father, in the same manner as if it had belonged to the father himself, and the succession follows the order laid down in the text of Yajnavalkya regulating obstructed succession. *Quare :* Whether the son or grandson of the father in such a case takes before the father or after him and before the other heirs mentioned in the said text. DWARKA NATH ROY *v.* SARAT CHANDRA SINGH ROY (1911), I. L. R. 39 Calc. 319

———*Surety—Father's liability as surety—Whether son is liable to pay debt incurred by father as surety.* Under the Hindu Law, a son is liable for a debt incurred by his father as surety. *Tukarambhat* v. *Gangaram Mulchand Gujar*, I. L. R. 23 Bom. 454, and *Maharaja of Benares* v. *Ramkumar Misir*, I. L. R. 26 All. 611, referred to. RASIK LAL MANDAL *v.* SINGHESWAR RAI (1912), I. L. R. 39 Calc. 843

———*Will—Gift to future wife of son of testator, she being in existence at the time of the testator's death, whether valid—Succession Act (X of 1865), s. 99, effect of—Hindu Wills Act (XXI of 1870), s. 3, how far controls principles of Hindu Law.* Section 99 of the Indian Succession Act does not apply to the will of a Hindu and invalidate provisions made in accordance with the principles of the Hindu Law. A bequest made by a father to the would-be wife of his son may be deemed a bequest to a person described as standing in a particular degree of kindred to his son within the meaning of the exception to section 99 of the said Act. Although by section 3 of the Hindu Wills Act the provisions of section 99 of the Indian Succession Act were made applicable to the Hindus, the intention of the Legislature was to leave unaffected the rules of Hindu Law. According to the principles of Hindu Law, a bequest made by a person to his son's would-

PAGE.

Hindu Law—*concld.*

be wife, who was in existence at the time of the testator's death, is valid, notwithstanding the provisions of section 99 of the Indian Succession Act. DINESH CHANDRA ROY CHOWDHURY *v.* BIRAJ KAMINI DASSEE (1911), I. L. R. 39 Calc. ... 87

Hindus in Bihar: *See* MAHOMEDAN LAW—PRE-EMPTION 915

Hindu Wills Act (XXI of 1870), s. 3: *See* HINDU LAW—WILL 87

Iddut, reconversion during the period of: *See* MAHOMEDAN LAW—BIGAMY ... 409

Immoral or illegal debt: *See* HINDU LAW—FATHER'S DEBT 826

Immovable Property, suit for: *See* MESNE PROFITS 220

Impartible Estate: *See* KUNJPURA, STATE OF 711

Import: *See* EXCISABLE ARTICLES ... 1053

Incestuous Adultery, condonation of: *See* DIVORCE 395

Incumbrance. *See* LANDLORD AND TENANT 138

Independent Advice: *See* PURDANASHIN DONOR 933

Indian Explosives Act (IV of 1884), rule 3 (1) (*b*). *See* MAGISTRATE ... 119

Inherent Power: *See* DECREE, AMENDMENT OF 265

Inheritance: *See* CUSTOM 418

Injunction: *See* CONSEQUENTIAL RELIEF, PRAYER FOR 704

Injury to Health: *See* DIVORCE ... 395

Insolvency: *See* FORFEITURE ...1048

Instruments of Gaming: *See* COTTON-GAMBLING 968

Intention of Parties: *See* MORTGAGE ... 527

Interlocutory injunction, breach of: *See* EASEMENT 59

Irregularity. *See* SALE IN EXECUTION OF DECREE 26

Jagirs. *See* SETTLEMENT, CONSTRUCTION OF 1

Jalkar:—*Dispute concerning jalkar—Jurisdiction of Magistrate to institute proceeding under s. 145 of the Code, after an orders binding down one of the parties to keep the peace—Order attaching the subject of dispute on being unable to determine the question of possession—Crimnal Procedure Code (Act V of 1898), ss. 107, 145, 146.* The Magistrate has jurisdiction to take proceedings under s. 145 of the Criminal Procedure Code, after an order under s. 107 of the Code binding down one of the parties to keep the peace, when the circumstances so require Where there was a reasonab e apprehension that several persons, who were interested in the subject of dispute and had absconded at the time of the s. 107 proceeding, might cause a breach of the peace with the first party, who were fishermen, or that the latter might seek to enforce their rights against the second party, who had been bound down, in which case the order binding them down would have the effect of ousting them from any possession they might have: *Held*, that the Magistrate acted properly in instituting proceedings under s. 145 of the Code, in order to determine which party was in actual possession of the disputed properties, and was justified in attaching the same, under s. 146, if he found himself unable to determine the question of possession. BAISNAB CHARAN MAJHI *v.* GATINATH MUNSHI (1912), I. L. R. 39 Calc. 469

Judicial Act: *See* SEARCH FOR ARMS ... 953

Jurisdiction: *See* CRIMINAL PROCEDURE CODE, 1898, s. 522 1050

———: *See* LAND ACQUISITION ... 33

———: *See* MAGISTRATE ... 119

———: *See* PROHIBITORY ORDER ... 104

———*See* SANCTION FOR PROSECUTION 774

Jurisdication—*Letters Patent, High Court, 1865, cl. 12—Wrongful cutting and removal of coal—Trespass—Disputed boundary—Suit for land—Agreement between predecessors in title of parties*

PAGE.

Jurisdiction—*contd.*

—*Privity of contract and estate.* The plaintiff company's predecessors in title who held certain coal lands known as Mouza Lodna in Manbhum, under a permanent lease, granted an under-lease of a share thereof to S., and it was agreed that the boundary should be demarcated between the portion underleased and the portion retained by the grantors, and that a barrier of 30 feet of coal should be maintained between the two portions of the mouza, and that if either party encroached within 15 feet of the boundary line, he should make good any loss sustained by the other party. No boundary was demarcated at the time. The permanent lease of the said mouza was, subject to the said under-lease to S, subsequently assigned to T and others, and thereafter the boundary was laid down and marked by the respective agents of T and others, and of S, and a plan showing the boundary was signed by both parties. Subsequent thereto T and others assigned their permanent lease of the mouza to the plaintiff company, and S granted an under-lease of his share in the mouza to R. L. S., who granted an under-lease of the same to the defendant who there carried on a colliery. The plaint alleged that the defendant had wrongfully cut into and removed portions of coal from the 30 feet of barrier and beyond it; that the trespass and conversion had taken place within two years; and that the coal so removed had been sold and delivered to the plaintiff company under an agreement to purchase the output of the defendant's colliery, and claimed damages for the value of the coal so removed, and damages caused by the breach of contract in cutting through the barrier. The defendant denied that he had carried away any coal from the 30 feet barrier, and stated that he had confined his operations well within the area under-leased to him, and that the plaintiff company had never been in possession of the area from which he had carried away

PAGE.

Jurisdiction—*concld.*

coal: *Held*, that the suit, so far as it sought to recover damages for carrying away the plaintiff company's coal, was founded on a case of trespass *quare clausum fregit* which necessitated the title in respect of that coal being gone into, and was therefore a suit for land within the meaning of cl. 12 of the Charter. *Rajmohun Bose* v. *East Indian Railway Co.*, 10 B. L. R. 241, distinguished. That so far as the agreement not to cut into the 30 feet of barrier was concerned, there was no privity of contract or estate between the defendant and the plaintiff company, and the defendant was not personally liable on any of the covenants in the under-lease granted to S, and that the plaint did not disclose any cause of action against the defendant based on the agreement. LODNA COLLIERY CO. *v.* BIPIN BIHARI BOSE (1912), I. L. R. 39 Calc. ... 739

Jurisdiction of High Court: *See* HABEAS CORPUS 164

Jurisdiction of Magistrate: *See* DISPUTE CONCERNING EASEMENT 560

——————————: *See* DISPUTE CONCERNING LAND 150

——————————: *See* JALKAR ... 469

——————————: *See* SECURITY FOR GOOD BEHAHIOUR ... 456

——————————*Charge with a view to commitment, cancellation of —Criminal Procedure Code (Act V of 1898), s. 213 (2)—Cross-examination of prosecution witnesses after framing of the charge, effect of—"Witnesses for the defence," interpretation of—Practice.* It is open to a Magistrate, having drawn up a charge against an accused person with a view to his commitment to the Court of Session, to allow the accused to cross-examine the witnesses for the prosecution and, as the result, to cancel the charge. The words "witnesses for the defence" in s. 213 (2) are wide enough to cover evidence elicited in cross-examination of witnesses for the prosecution. *Surjya Narain Singh*,

PAGE.

Jurisdiction of Magistrate —*concld.*

In re, 5 C. W. N. 110, referred to. JOGENDRA NATH MOOKHERJEE *v.* MATI LAL CHUCKERBUTTY (1912), I. L. R. 39 Calc. 885

Kabuliyat—*Lease—Landlord and Tenant—Kabuliyat without pottah if constitutes a lease—Transfer of Property Act (IV of 1882), ss. 4, 105 and 107—Amending Act (III of 1885), s. 3—Registration Acts (III of 1877), s, 3, and (XVI of 1908), s. 2(7).* A registered *kabuliyat* signed by the lessee and accepted by the lessor is sufficient to constitute a lease within the meaning of section 107 of the Transfer of Property Act, *Akram Ali* v. *Durga Prasanna Roy Chowdhuri*, 14 C. L. J. 614, referred to. *Nand Lal* v. *Hanuman Das*, I. L. R. 26 All. 368 ; *Kashi Gir* v. *Jogendro Nath Ghose*, I. L. R. 27 All. 136 ; *Sheo Karan Singh* v. *maharaja Parbhu Narain Singh*, I. L. R. 31 All. 276 ; *Turof Sahib* v. *Esuf Sahib*, I. L. R. 30 Mad. 322 ; *Kaki Subbanadri* v. *Muthu Rangayya*, I. L. R. 32 Mad. 532, discussed. *Sayad Ajam Sahib* v. *Madura Sree Meenatchi Sundareswarar Devastanam*, 21 Mad. L. J. 202, approved. *Nilmamud Sarkar* v. *Bo il Das*, 14 C. W. N. 73, distinguished. RAIMONI DASSI *v.* MATHURA MOHAN DEY (1912), I. L. R. 39 Calc. 1016

Kunjpura, State of—*Succession to estate of Panjab Ruling Chiefs—Custom—Impartible estate—Primogeniture—Mahomedan Law—Suit by junior members of Kunjpura family for shares in estate—Zemindari rights—Property appertaining to Chiefship up to 1849—Property subsequently acquired.* The question in this case was as to the rule of succession applicable to the Kunjpura State situate in the Cis-Sutlej districts of the Punjab. The *riasat*, or *raj*, was founded by Najabat Khan, who in 1748 obtained a *sanad* from the Afghan Conqueror, Ahmed Shah Abdali, granting him an hereditary *jagir* of the villages of which he was then in possession, which were declared to be revenue-free, and held

PAGE.

Kunjpura, State of—*contd.*

subject to the obligation of maintaining order in his possessions. In 1849, however, the British Government withdrew from the Chief of Kunjpura the civil and criminal jurisdication under which he had been until then exercising quasi-sovereign power : *Held*, that it had been established beyond doubt that the Kunjpura Estate had, ever since the time of Najabat Khan, descended to a single heir who had been recognised as the Chief of an impartible *riasat*, and that attempts by junior members of the family to obtain shares in it had invariably failed. The two instances relied on as showing the allotment of share to junior members were, in their Lordships' opinion, opposed to that contention ; and no other evidence had been referred to suggesting that there had ever been a division of the estate in accordance with Mahomedan Law. The opinion of the Board of Adminstration in 1852 that the zamindari rights in the villages comprised in the *jagir* were the subjects of "inheritance according to the Mahomedan Law," and should be shared by all the members of the family, became ineffective, and was never acted upon in the course of the constant claims put forward by the junior members of the family to a share in the estate ; and later decisions on those claims laid down in explicit terms that the *zamindari* rights belonged to the *riasat*. With regard to the property acquired after 1849, in which the Chief Court had decided that the plaintiffs (younger brothers of the defendant who had taken possession of all the property as the eldest son) were by the Mahomedan Law entitled to shares : *Held* (reversing that decision), that there was nothing to show that the Government in withdrawing the civil and criminal powers which the Chiefs had exercised prior to 1849 intended to make any alteration in their status or to vary the rule which had governed the succession to

PAGE.

Kunjpura, State of—*concld.*

the estate. IBRAHIM ALI KHAN *v.* MUHAMMAD AHSANULLAH KHAN (1912), I. L. R. 39 Calc. ... 711

Lakhiraj title : *See* LIMITATION ... 453

Land Acquisition : *See* APPEAL ... 393

——————— *Debuttar—Shebait—Land Acquisition Act (I of 1894), s. 32, sub-s. (1), cls. (i) and (ii)—compensation—Whether shebait is entitled to withdraw compensation money for necessary repairs of debuttar property—Jurisdiction—Practice.* Land dedicated to an idol or to religious and charitable purposes is land belonging to the *shebait* or trustee "who has no power to alienate the same" within the meaning of the provisions of section 32 of the Land Acquisition Act. Where a portion of the *debuttar* property was acquired under the Land Acquisition Act. Where a portion of the *debuttar* property was acquired under the Land Acquisition Act, and the compensation money was invested in approved securities, the *shebait* is entitled to withdraw a portion of the invested funds and apply the same to effect necessary repairs to the remainder of the *debuttar* property. As under section 32 of the Act the compensation money is placed in the custody of the Court, jurisdiction is by implication conferred upon it to deal with all questions that may arise as to the application of the fund in its custody. KAMINI DEBI *v.* PRAMATHA NATH MOOKERJEE (1911), I. L. R. 39 Calc. 33

Land Acquisition Act (I of 1894), s. 32 : *See* COURT-FEE 906

——————————————**sub-s. (1), cls. (1), (2) :** *See* LAND ACQUISITION 33

——————————————**s. 54 :** *See* APPEAL 393

Land Acquisition Judge, order of : *See* COURT-FEE 901

Landlord and Tenant : *See* SECOND APPEAL 241

——————. *Digwari tenure in Manbhum—Grant of coal mines by digwar—Grant of mokurari lease—Minerals, right to, under the soil—Suit by zamindar claiming mineral rights—Parties to suit—Government—Digwar appointed and liable to dismissal by Government.* Though the digwari tenures in Manbhum are similar in some respects to the ghatwali tenures in Birbhum, as having been originally granted in consideration of the preformance of military service, to which police duties were attached, and as being hereditary and inalienable, the two kinds of tenure are not analogous : the ghatwals had special rights under Regulation XXIX of 1814, and as to minerals under Act V of 1859, and paid rent direct to Government and not to the zamindar. The Digwar of Tasra in Manbhum, appointed and liable to dismissal by Government, was the holder of two mouzahs at a fixed rent payable to the plaintiff (appellant) in whose zamindari they were situate. He granted a perpetual lease of the coal mines underlying the two mouzahs to a coal company who took possession and raised and sold a large quantity of coal. In a suit for a declaration of the zamindar's right to the minerals under the soil and for an account and an injunction : *Held* (reversing the decision of the High Court), that there having been at the time of the permanent settlement no separate settlement with the Digwar of Tasra (if the digwari tenure then existed, which was doubtful), and the mineral rights not being vested in him at that time, the presumption was that the mineral rights remained in the zamindar, in the absence of proof that he had parted with them. *Hari Narayan Singh Deo* v. *Siram Chakravarti*, I. L. R. 37 Calc. 723 ; L. R. 37 I. A. 136, followed. *Held*, also, that it was not necessary to make the Government a party to the suit. They had never claimed the minerals under the mouzas in suit, nor put forward any claim inconsistent with the rights asserted by

Landlord and Tenant—*contd.* PAGE.

PAGE.

Landlord and Tenant—*concld.*

the zamindar; and the rights of the Government would not be prejudiced or affected by the result of a suit to which they were not a party. DURGA PRASAD SINGH *v.* BRAJA NATH BOSE (1912), I. L. R. 39 Calc. ... 696

——— *Ejectment—Recorded tenant—Effect of denial of tenancy by him on his unrecorded co-sharer—Forfeiture.* In a suit for ejectment based on the ground of forfeiture by reason of the denial of the landlord's title, it was found that the denial was by the recorded tenant, and not by his unrecorded co-sharers in the tenancy: *Held*, that a person, representing the tenancy in the books of the landlord was entitled to bind his co-sharers for the purposes of the tenancy; but when he repudiated the tenancy, he must be taken to have acted beyond the scope of his authority; his disclaimer consequently could not operate as a forfeiture of the tenancy. BIRENDRA KISHORE MANKYA *v.* BHUBANESWARI (1912), I. L. R. 39 CALC. ... 903

——— "*Protected interests*"—*Incumbrance—Bengal Tenancy Act* (*VIII of 1885*), *s. 160* (*g*). The plaintiffs held under a sub-lease granted by G, who held under a permanent lease granted by B, B again holding under a permanent lease granted by P. The lease given by P to B authorized B to grant sub-leases: *Held*, that the right and interest of G, and therefore of the plaintiffs, are "protected interests," and are not such as can be interfered with by a purchaser under the Bengal Tenancy Act. AFAZUDDI KHAN *v.* PRASANNA GAIN (1911), I. L. R. 39 CALC. 138

Lease: *See* ESTOPPEL 513

——: *See* KABULIYAT 1016

——: *Oral agreement to lease—Petition of compromise—Matters extraneous to the suit in which the petition of compromise was filed—Specific performance—Abwab.* By a petition of compromise, which was filed in a previous suit between the parties concerning certain lands, the plaintiffs undertook to recognise the defendant as their tenant in respect of lands not included in that suit, and they further gave up their claim of *salami* for the recognition, on the defendant agreeing to pay an additional sum to what was payable by the original tenant. Upon a suit brought by the plaintiffs for recovery of arrears of rent on the basis of this compromise, defence was that the petition of compromise was not admissible in evidence for want of registration: *Held*, that, although the petition of compromise in so far as it related to properties which were not the subject-matter of the suit in which the decree was made, was not operative to affect such properties, it was admissible in evidence as indicating the existence of an oral agreement to grant a lease, which was specifically enforceable; and the position of the parties was the same, as if a proper document had been executed and registered; and that, therefore, the plaintiff was entitled to a decree. *Birbhadra Rath* v. *Kalpataru Panda*, 1 C. L. J. 388, and *Gurdeo Singh* v. *Chandrikah Singh*, I. L. R. 36 Calc. 193, referred to. The principle of *Walsh* v. *Lonsdale*, 21 Ch. D. 9., applied. *Held*, further, that the sum agreed to be paid by the defendant being in consideration of the land occupied by him, and also in view of the remission of the *salami*, was not an *abwab*. SARAT CHANDRA GHOSE *v.* SHYAM CHAND SINGH ROY (1912), I. L. R. 39 CALC. 663

Lease, variation in the terms of: *See* REGISTRATION 284

Leave to appeal: *See* PRIVY COUNCIL ... 510

——— **to Privy Council:** *See* REVIEW 1037

Letters of Administration: *See* ADMINISTRATION BOND 563

PAGE.

Letters Patent, High Courts, 1865, Cl. 15 : *See* ARBITRATION—RIGHT OF APPEAL : 822

——————————, **Cl. 12 :** *See* JURISDICTION 739

Lex fori : *See* HABEAS CORPUS ... 164

Liability for loss of goods : *See* CARRIERS 311

——— **of master for Acts of Servant :** *See* MASTER AND SERVANT ... 344

License : *See* EXCISABLE ARTICLES ...1053

Light and Air : *See* EASEMENT ... 59

Limitation : *See* APPEAL TO PRIVY COUNCIL 766

————— : *See* EX PARTE DECREE ... 506

————— : *See* PRIVY COUNCIL—LEAVE TO APPEAL TO 510

——— *Adverse possession—Rent-free tank—Setting up hostile title to the knowledge of the landlord—Lakhiraj title.* In a suit for recovery of possession of a tank with its banks by establishment of plaintiff's zamindari title thereto, and in the alternative for assesment of rent, the defendant pleaded that the tank was rent-free and that the suit was barred by limitation. It appeared that the defendant more than twelve years ago, in the settlement proceedings, claimed the tank as rent-free without any reference to any *sanad*, and the plaintiff's agent denied the claim : *Held*, that, inasmuch as a complete hostile right was claimed by the defendant to the knowledge of the plaintiff, and as no suit was brought until more than twelve years after, the suit as framed was barred by limitation. BIRENDRA KISHORE MANIKYA *v.* ROSHAN ALI (1912), I. L. R. 39 Calc. 453

Limitation Act (XV of 1877), s. 26 : *See* FISHERY 53

————————— **Sch. II, Art. 118 :** *See* CUSTOM 418

————————— **Art. 124 :** *See* SHEBAIT 887

————————— **Art. 132 :** *See* MORTGAGE 527

————————— **Art. 164 :** *See* EX PARTE DECREE ... 506

PAGE.

Limitation Act (IX of 1908), ss. 5, 12, Sch. I, Art. 179 : *See* APPEAL TO PRIVY COUNCIL 766

————————— **s. 12, Sch. I, Art. 179** 510

————————— **s. 19 :** *See* ACKNOWLEDGMENT 789

————————— **s. 26 :** *See* EASEMENT 59

————————— **Sch. I, Art. 164 :** *See* EX PARTE DECREE 506

————— **question of :** *See* HIGH COURT, JURISDICTION OF 473

Liquidators in Possession : *See* MORTGAGE 810

Local inspection—*Results of inspection not recorded at the time, but embodied in the trying Magistrate's judgment—Effect of omission of contemporaneous record—Facts so found not impugned before the Appellate Court—Legality of the conviction—Prejudice.* A Magistrate trying a case may view the place of occurrence in order to follow or understand the evidence, but he should be careful not to allow any one on either side to say anything to him which might prejudice his mind one way or the other. *In re Lalji*, I. L. R. 19 All. 302, approved of. There is nothing in the Criminal Procedure Code to prevent a Magistrate from holding a local investigation for the purpose of elucidating any matter in dispute, and in so far as it conforms to the provisions of the law of evidence it cannot be excluded. He should place on record the results of the local investigation, but it is not a positive rule of law that a note thereof must be made on the spot. Where the facts established by the local investigation are impugned, and there is no contemporaneous record of them, the Appellate Court cannot act on them ; but if they are not impugned, the Court cannot exclude them from consideration, because there is no such record, when the accused is not prejudiced by the irregularity. *Joy Coomar* v. *Bundhoo Lall*, I. L. R. 9 Calc. 363,

PAGE.

Local inspection—*concld.*
followed. *Babbon Seikh* v. *Emperor*, I. L. R. 37 Calc. 340, *Girish Chunder Ghose* v. *Queen-Empress*, I. L. R. 20 Calc. 857, distinguished. Where the defence suggested that the alleged place of occurrence, a mound of earth was not scalable, nor arge enough to accomodate the number of assailants said to have been present, upon which the trying Magistrate inspected the locality and found the facts against the accused, but made no separate note thereof on the record at the time, though he embodied them in his judgment, and they were not impugned before the Appellate Court, but it was sought to exclude them on the ground of the mission of such note : *Held*, that the omission of the Magistrate to record a note of the results of the local inspection at the time had not prejudiced the accused, and that the conviction was not bad on that ground. ATIAR RAI *v.* EMPEROR (1912), I. L. R. 39 Calc. ... 476

Loss of Goods : *See* CARRIERS ... 311

Loss of Parcel : *See* "SHAWLS," MEANING OF 1029

Love-potion : *See* CAUSING DEATH BY RASH OR NEGLIGENT ACT 855

Magistrate—*Jurisdiction—Cognizance of an offence under the Penal Code—Incompetence to take cognizance, on the same facts, of an offence under a special Act, for want of consent of Government—Subsequent complaint to a superior Magistrate of an offence under the Special Act, with the necessary consent obtained from Government—Jurisdiction of latter to take cognizance without withdrawal of the case to his own file—Search for explosives in the presence of police officers of superior rank—Legality of search—Opinion of Assessors, how to be recorded—Preparation to commit dacoity—Admissibility of documents found in possession of the accused—Criminal Procedure Code (Act V of 1898), ss. 190, 309, 529(e), 530(k), and 531—Penal Code (Act XLV of 1860), s. 399—Explosive Substances Act (VI of 1908), ss. 4(b) and 7—Indian Explosives Act (IV of 1884), rule 32(1) (b) of Government Rules.* Where a complaint was filed by a Sub-Inspector of Police before the Subdivisional Magistrate of an offence under section 399 of the Penal Code, and the facts disclosed also an offence under section 4(*b*) of the Explosive Substances Act (VI of 1908), of which the Magistrate could not then take cognizance for want of the consent of Government under section 7 of the Act, and a complaint was subsequently filed by the Superintendent of Police, with such consent obtained, before the Additional District Magistrate : *Held*, that the latter had jurisdiction to take cognizance of the offence, and that the initiation and continuation of the proceedings by him were legal, notwithstanding that he had not withdrawn the original case to his own file. *Jhumuck Jha* v. *Pathuk Mandal*, I. L. R. 27 Calc. 798, *Golapdy Sheik* v. *Queen-Empress*, I. L. R. 27 Calc. 979 [followed in *Radhalullav Ray* v. *Benode Behari Chatterjee*, I. L. R. 30 Calc. 449], *Emperor* v. *Sourindra Mohan Chuckerbutty*, I. L. R. 37 Calc. 412, *Moul Singh* v. *Mahabir Singh*, 4 C. W. N. 242, *Charu Chandra Das* v. *Narendra Krishna Chakravarti*, 4 C. W. N, 367, *Bishen Doyal Rai* v. *Chedi Khan*, 4 C. W. N. 560, and *Jharu Jola* v. *Shukh Deo Singh*, 3 C. L. J. 87, distinguished. *Held*, also, that in any case, having regard to sections 529 (*e*), 530 (*k*) and 531 of the Criminal Procedure Code, unless it appeared that the proceedings wrongly held had, in fact, occasioned a failure of justice, they could not be set aside. *Sonatun Dass* v. *Gooroo Churn Dewan*, 21 W. R. Cr. 88, referred to. A search for explosives by police officers of rank not below that of an Inspector, is legal under rule 32(*1*) (*b*) of the Government Rules framed under the Indian Explosives Act (IV of 1884). Section 309 (*1*) of the Criminal Pro-

PAGE.

Magistrate—*concld.*

cedure Code requires the opinions of the Assessors to be stated orally, and not in writing or in the form of a judgment under section 367. Under section 399 of the Penal Code, having in possession or immediate control any explosive substance is one of several means to the end, whereas, under section 4 (*b*) of the Explosive Substances Act, it is the offence itself, provided the necessary intent is proved. In order to render documents found in the possession of a party admissible against him as proof of their contents, it is necessary to show that he has in some way identified himself or, in other words, has, by any act, speech or writing, manifested an acquaintance with, and knowledge of, the contents of all or any of them. The rule would apply more strongly where some of the papers and letters were received, and others written, by the party against whom they are sought to be used. *Wright* v. *Tatham*, 5 Cl. & Fin. 670 and *Barindra Kumar Ghose* v. *Emperor*, I. L. R. 37 Calc. 467, followed. LALIT CHANDRA CHANDA CHOWDHURY *v.* EMPEROR (1911), I. L. R. 39 Calc. ... 119

Magistrate, jurisdiction of: *See* HABEAS CORPUS 164

———————*Criminal Procedure Code (Act V of 1898), ss. 100, 552—Jurisdiction of first class Magistrate, upon an application under s. 552 of the Code, to issue a search warrant under s. 100 on a fresh complaint of facts alleging wrongful confinement—Warrant under s. 100 drawn up on a printed form used under s. 98, with the necessary alterations—Presumption that such alterations were made—Destruction of original warrant by the accused—Resistance to execution of such warrant and assault on the police—Penal Code (Act XLV of 1860), ss. 147 and 332.* Where on an application made under s. 552 of the Criminal Procedure Code to a Magistrate of the first class, he examined the applicant on oath, recorded a statement of facts alleging wrongful detention of his wife, and directed the issue of a search-warrant under s. 100 : *Held*, that he had jurisdiction to do so. A search-warrant under s. 100 of the Code drawn up, in the absence of a printed form of warrant thereunder, on a printed form used under s. 98, with the necessary alterations, is not illegal. *Bisu Haldar* v *Probhat Chunder Chuckerbutty*, 6 C. L. J. 127, distinguished. Where the original warrant was in such a case not produced at the trial owing to its destruction by the accused at the time of its execution : *Held*, that it must be taken that it contained the substance of s. 100, and that the necessary alterations were made. GORA MIAN *v.* ABDUL MAJID (1911), I. L. R. 39 Calc. ... 403

PAGE.

Magistrate, jurisdiction of—*contd.*

———————*Deputy Magistrate in charge of the office of the District Magistrate at head-quarters—Subordination of the Sub-divisional Magistrate to such Deputy Magistrate—Power of latter after taking cognizance and examining the complainant on oath to direct a local investigation by the former—Irregularity, effect of—Power of the same to dismiss the complaint, and order the prosecution of the complainant on evidence taken at the investigation and on the report of the Subdivisional Officer—Criminal Procedure Code (Act V of 1898), ss. 12, 202, 203, 476 and 529(f).* A Subdivisional Magistrate is not, under s. 202 of the Criminal Procedure Code, subordinate to a Deputy Magistrate, appointed to act in the district, without definition of the local limits of his jurisdiction, who was in charge of the office of the District Magistrate at head-quarters during the latter's absence on tour, and such Deputy Magistrate cannot, therefore, after taking cognizance of an offence committed in the subdivision, and examining the complainant on oath, direct a local investigation by the Subdivisional Magistrate, nor can he

PAGE.

Magistrate, jurisdiction of—*concld.*
thereafter dismiss the complaint, and order the prosecution of the complainant under s. 476 of the Code on such report, and the evidence taken at the investigation. Section 529(*f*) does not, in the circumstances, confer jurisdiction on the Deputy Magistrate to make such orders of dismissal and prosecution, but vests the Subdivisional Magistrate with seisin of the case, and the latter alone can inquire into it and pass final orders. BHIKU HOSSEIN *v.* EMPEROR (1912), I. L. R. 39 Calc. 1041

Mahomedan Law—ADOPTION : *See* CUSTOM 418

——————SUCCESSION : *See* KUNJPURA, STATE OF 711

——————*Bigamy—Effect of apostacy of husband after marriage, and reconversion to Islam during the period of iddut—Second marriage of the wife with another man during such period—Abetment—Penal Code (Act XLV of 1860), ss. 494 and* $\frac{491}{109}$. Under the Mahomedan Law the marriage of a man, who subsequently embraces Christianity, becomes *ipso facto* void, notwithstanding his reconversion to Islam during the period of *iddut*; and the wife, in contracting a second marriage during such period, does not commit bigamy under s. 494 of the Penal Code. *Per* HOLMWOOD J. A second marriage contracted by the wife during the period of her *iddut* is not void by reason of its taking place during the life of the first husband, but by reason of a special doctrine of the Mahomedan Law with which the Penal Code has nothing to do. Where the parties have acted in good faith or what they believe to be a sound interpretation of a very difficult point of Mahomedan Law, even though they are mistaken, the consequences cannot be visited upon them in a Criminal Court in a trial for bigamy. ABDUL GHANI *v.* AZIZUL HUQ (1911), I. L. R. 39 Calc. ... 409

——————*Pre-emption—Customary right—Hindus in Bihar—Right of*

PAGE.

Mahomedan Law—*contd.*
pre-emption—Co-sharers—Assertion of right of pre-emption, delay in making—Power to perform ceremonies of assertion—Manager appointed by Court of Wards of estate of "disqualified proprietor" under the Court of Wards Act (Ben. Act IX of 1879)—Power and duties of Manager under section 40 of Act—Basis of right of pre-emption among co-sharers in undivided mahal—Sanction of Court of Wards. The Mahomedan Law of pre-emption has long been judicially recognised as existing among the Hindus in Bihar, to which the district of Champaran appertains. *Fakir Rawot* v. *Emambaksh*, B. L. R. Sup. Vol. 35 ; W. R. F. B. 143, followed. In a suit for pre-emption in respect of certain undivided shares in a number of villages comprised in a mahal, the estate of the plaintiff was in charge of the Court of Wards as that of a "disqualified proprietor" under Bengal Act IX of 1879, section 40 of which provides that the Manager "shall manage the property . . . diligently and faithfully for the benefit of the proprietor, and shall in every case act to the best of his judgment for the ward's interest, as if the property were his own : *Held*, that the Manager appointed by the Court of Wards was independently of the provisions of section 40 of the Court of Wards Act competent, on behalf of the plaintiff, to perform the preliminaries essential to the assertion of the right to pre-emption : though if, in that case, the validity of his action depended on the sanction of the Court of Wards, their Lordships were of opinion that section 40 gave him full authority to act as he had done ; and in that view the adoption of his acts by the Court of Wards became unnecessary. A "mahal" is a unit of property, and though all the villages of which it consists may be separately assessed for revenue purposes, and each of the sharers may not have an interest in them all, the sharers are all co-sharers in the whole mahal,

PAGE.

Mahomedan Law—*concld.*
and jointly liable for the Government revenue. Each co-sharer, therefore, has a right of pre-emption against the others in respect of any part of the mahal sold by any of them to a stranger. After partition by the Revenue authorities, each share so partitioned becomes a unit of property. JADU LAL SAHU *v.* JANKI KOER (1912), I. L. R. 39 Calc. 915

Maiden's Stridhan: *See* HINDU LAW—SUCCESSION 319

Malice, charge of: *See* TRESPASS—SEARCH FOR ARMS 953

Malikana or Dasturat: *See* SETTLEMENT, CONSTRUCTION OF 1

Manager under Court of Wards: *See* MAHOMEDAN LAW—PRE-EMPTION ... 915

Managing Agent: *See* MORTGAGE ... 810

Mandamus: *See* MUNICIPAL ELECTION ... 898

Manufacture, Sale or Possession: *See* EXCISABLE ARTICLES 1053

Marriage: *See* BURMESE LAW ... 492

—— ——: *See* MAHOMEDAN LAW—BIGAMY 409

Marriage with Wife's Sister: *See* BURMESE LAW—MARRIAGE 492

Master and Servant: *See* ADULTERATION 682

——————*Ganja—Illegal possession of ganja by servant acting on his own behalf and beyond the scope of his employment—Liability of the master for the act of the servant—Bengal Excise Act (Beng. V of 1909), ss. 46(a) and 56.* To support a conviction under s. 56 of the Bengal Excise Act, it is necessary to show not only that a servant was in the employ of the master, but also that he was acting within the scope of his employment and for the benefit of the latter. Where a servant, whose duty was to remain at his master's shop and to conduct the business there, was found travelling to another place with *ganja* in his possession, in contravention of s. 46(*a*) of the Act: *Held*, that the master could not be convicted under s. 56, as his servant

PAGE.

Master and Servant—*concld.*
acted beyond the scope of his employment and for his own private purpose. *Suffer Ali Khan* v. *Golam Hyder Khan*, 6 W. R. Cr 60, referred to. *Emperor* v. *Haji Shaik Mahomed Shustari*, I. L. R. 32 Bom. 10, distinguished. UTTAM CHAND *v.* EMPEROR (1911), I. L. R. 39 Calc. ... 344

Measures of Right: *See* EASEMENT ... 59

Memorandum of Appeal: *See* COURT-FEE 906

Merchant Shipping Act (57 & 58 Vict., c. 60), ss. 684, 686: *See* HIGH COURT, JURISDICTION OF 487

Mesne Profits—*Execution of decree—Immovable property, suit for—Purchaser pendente lite, whether legal representative of the original owner—Civil Procedure Code (Act V of 1908), OO. XX, r. 12(2); XXI, r. 102, and XXII, r. 10; and s. 2(11).* Proceedings for the assessment of the mesne profits, after a decree had been obtained in a suit for recovery of possession of immovable property, are proceedings in continuation of the original suit. A suit for recovery of possession of immovable property was brought against *A*. During the pendency of the suit, *B* and *C* purchased the property from *A*, but they did not apply to have their names added as defendants in the pending suit. The suit having been decreed, the decree-holder applied for execution of the decree against *A*, *B* and *C* and asked for possession of land and for the assessment of mesne profits. On an objection taken by *B* and *C* that they were not the legal representatives of *A* and that they could not be made liable in execution proceedings for the mesne profits decreed against *A*: *Held*, that, although *B* and *C* were not the legal representatives of *A*, the execution proceedings being proceedings in continuation of the original suit, and they being purchasers *pendente lite*, they were liable for the mesne profits decreed against *A*. MIDNAPORE ZEMINDARI COMPANY, LD., *v.* NARESH NARAIN ROY (1911), I. L. R. 39 Calc. ... 220

PAGE.

Minerals, right to : *See* LANDLORD AND TENANT 696

Minor : *See* SPECIFIC PERFORMANCE ... 232

Misconduct of Servant or Agent : *See* EXCISABLE ARTICLES 1053

Mistake, clerical or arithmetical : *See* DECREE, AMENDMENT OF 265

Mitakshara : *See* HINDU LAW—FATHER'S DEBT 862

———— : *See* HINDU LAW—SUCCESSION 319

Mokurrari Lease : *See* DIGWARI TENURE ... 696

Mortgage : *See* ESTOPPEL 513

———— *Company—Managing agents—Articles of association, breach of, by managing agents—Acts requiring approval of Directors—Presumption regarding internal management—Validity of deed irregularly executed—Equitable security—Winding up—Lease—Liquidators in possession—Acquiescence of landlord—Arrears of rents and royalities, whether secured debts.* The company's articles of association empowered the managing agents, with the approval of the directors, to borrow or raise sums of money for the purposes of the company, and to secure repayment of such sums by mortgage or charge of the property of the company, and to draw all such instruments as should be necessary for the carrying on of the business of the company, and directed that every instrument to which the seal of the company was affixed should be signed by at least one director, and countersigned by the managing agents. B. D., a stranger, advanced money to the company, which was credited in the company's books under loan account, and was given an instrument by way of hypothecation or security, to which was affixed the seal of the company and which was signed by the managing agents, but it did not sufficiently appear that the money had been borrowed with the approval of the directors, and the instrument was not signed by any of the directors as

PAGE.

Mortgage—*contd.*

required by the articles: *Held*, that it was not necessary to show the approval of the directors, inasmuch as this was a matter of internal management, regarding which the lender was, if he knew nothing to the contrary, entitled to assume as against the company that the managing agents had the authority or approval of the directors. *The Royal British Bank* v. *Turquand*, 6 El. & Bl. 327, *In re County Life Assurance Co.*, L. R. 5 Ch. App. 288, *County of Gloucester Bank* v. *Rudry Merthyr Colliery Co.*, [1895] 1 Ch. 629, and *In re Bank of Syria*, [1901] 1 Ch. 115, followed. With regard to the signature of a director, even if the security be not complete, the lender who had advanced money to the company upon the terms that security should be given him, is entitled under the rules of equity to have a charge upon the property of the company. *In re Queensland Land and Coal Co.*, [1894] 3 Ch. 181, and *Pegge* v. *Neath Tramways Co., Ld.*, [1898] 1 Ch. 183, followed. Where a landlord, to whom rents and royalties are payable by a company which goes into liquidation, acquiesces in the liquidators remaining in possession of the property leased, he cannot claim to be a secured creditor in respect of arrears of such rents and royalties. CHARNOCK COLLIERIES CO., LD., *v.* BHOLANATH DHAR (1912), I. L. R. 39 Calc. 810

———— *Decree in foreclosure—Suit against legal personal representative of widow—Res judicata—Suit for redemption by the widow's reversionary heir—Effect of decree on appeal on original decree—Decree of Appellate Court what it exactly should be—Civil Procedure Code (XIV of 1882), ss. 551, 577, 586.* Decree in a foreclosure suit which was instituted against the mortgagor, who was a widow, and which was wrongly continued in appeal by the legal personal representative of the widow, and in which the reversioner was no party, is no

PAGE.

Mortgage—*contd.*

bar to a suit for redemption by the reversionary heir. Where there is a decree on appeal which confirms the decree against which the appeal is made, it is the appellate decree to which regard must be had. The appellate decree supersedes the original decree. *Noor Ali Chowdhury* v. *Koni Meah*, I. L. R. 13 Calc. 13, followed. *Semble:* The expression of law contained in section 577 of the Code of Civil Procedure of 1882 as regards the proper course to be adopted in appellate decrees, viz., that except when an appeal is incompetent as being out of time, or as coming within the provisions of section 586, an appeal is not to be dismissed, but the judgment is to confirm, vary or reverse the decree against which the appeal is made, is still applicable. KAILASH CHANDRA BOSE *v.* GIRIJA SUNDARI DEBI (1912), I. L. R. 39 Calc. 925

———*Right to foreclosure and right to redeem, if co-extensive—Covenant to pay the mortgage money within a year, effect of.* Unless there is an agreement to the contrary, the right of foreclosure and the right of redemption must be deemed co-extensive. In each particular instance, therefore, it must be determined upon the terms of the contract between the parties whether there is any special provision in the contract which takes the case out of the general rule. Where the covenant in the mortgage deed was that the mortgagor shall pay the amount of principal and interest within the term of one year: *Held*, that this clause was inserted for the benefit of the mortgagor so that he may be at liberty to pay the principal with interest before the expiry of the year. *Rose Ammal* v. *Rajarathnam Ammal*, I. L. R. 23 Mad. 33, relied on: *Held*, further, that such a case falls within the class of cases in which the mortgage is payable before a certain day, and not within the class where a day is fixed for the repayment of the debt. *Raghubar Dayal* v. *Budhu Lal*, I. L. R. 8 All. 95, and *Brown* v. *Cole*, 14 Sim. 427, distinguished. PURNA CHANDRA SARMA *v.* PEARY MOHAN PAL DAS (1912), I. L. R. 39 Calc. ... 828

———*Sale of mortgaged property—Prior mortgage, extinguishment of—Intention of parties—Effect of payment of prior mortgage by subsequent mortgagee—Res judicata—Omission to raise issue in former suit when party thereto—Civil Procedure Code (Act XIV of 1882), s. 13, expl. (2)—Transfer of Property Act (IV of 1882), s. 85—Parties to mortgage suits—Limitation Act, 1877, Sch. II, Art 132.* In a suit brought on a simple mortgage deed, dated 17th February 1888, to recover Rs. 12,000 and interest, and to have it declared that the properties covered by the mortgage in suit, and by a *zarpeshgi* deed, dated 20th November 1874, were liable for the decretal amount, it appeared that by the deed of 1874 the properties in suit were hypothecated as security for Rs. 12,000, the mortgagee to have possession until the amount was repaid in 1887. Subsequently, on dates intermediate between 20th November 1874 and 17th February 1888, three of the properties in suit (the only properties concerned in this appeal) were further charged by simple mortgages, some of them relating only to two of such properties, and one of them relating only to the third of such properties, and suits on them were brought on 6th September 1888, 3rd May 1890, and 15th July 1890, and decrees for sale were obtained in them, the mortgagee of the mortgage in suit of 17th February 1888 or her representatives being made parties only to those suits and decrees which related to two of the properties mortgaged. The mortgage in suit was repayable in two years, and was, by agreement of the parties to it, made for the express purpose of paying off the debt of Rs. 12,000 on the *zarpeshgi*

PAGE.

Mortgage—*contd.*
deed of 1874, and charged the same properties as were hypothecated by that deed. The money then borrowed was, on 15th July 1888, in accordance with the agreement, applied in discharging the debt in the *zarpeshgi* deed, and that deed was then given up to the mortgagee of the mortgage in suit; and her representatives, on 16th June 1891, assigned the mortgage in suit to the plaintiffs, who on 22nd September 1900 instituted the present suit making defendants the representatives of the mortgagors, the representatives of the mortgagee, and the persons whose titles as decree-holders and purchasers arose under the intermediate mortgages made between 20th November 1874 and 17th February 1888, claiming priority over the last set of defendants: *Held*, that, under the circumstances, the mortgagee of the mortgage in suit intended to keep alive for her benefit the charge created by the *zarpeshgi* deed of 20th November 1874, notwithstanding that no formal assignment in writing of that deed was made; and she thereby obtained priority over the mortgagees of the intermediate further charges: *Dinobundhu Shaw Chowdhury* v. *Jogmaya Dasi*, I. L. R. 29 Calc. 154; L. R. 29 I. A. 9, followed. *Held*, also, that in any case, she was, under section 85 of the Transfer of Property Act (IV of 1882), a necessary party to all the suits on the intermediate mortgages, and consequently in the suits to which she or her representatives were made parties, her rights under her mortgage were barred by explanation (2) of section 13 of the Civil Procedure Code (Act XIV of 1882) by her omission in those suits to put those rights in issue; though such rights were not affected by the decree in the suit to which she or her representatives were not made parties. But, *held*, further, that the appellants' rights of priority under the *zarpeshgi* deed of 1874 were barred by Art. 132 of the Limitation Act (XV of 1877),

PAGE.

Mortgage—*concld.*
the present suit to enforce them not having been instituted within 12 years from the date when the money under that deed became repayable in 1887. *Held*, therefore, that they were only entitled in the present suit to a decree for redemption of their interest in the third property, the subject of the suit, to which their assignors had not been made parties. MAHOMED IBRAHIM HOSSAIN KHAN *v.* AMBICA PERSHAD SINGH (1912), I. L. R. 39 Calc. 527

Municipal Assessment—*Principle of assessment—Valuation of property, basis of—Appeal-Committee—Bengal Municipal Act (Ben. III of 1884), ss. 85, 114.* In assessing tax upon persons under clause (*a*) of s. 85 of the Bengal Municipal Act, both the "circumstances" and the "property" referred to in the section must be within the municipality in question. S. 114 of the Bengal Municipal Act does not lay down that application shall be heard and determined by all the Commissioners appointed as members of the Appeal-Committee. DEB NARAIN DUTT *v.* CHAIRMAN OF THE BARUIPUR MUNICIPALITY (1911), I. L. R. 39 Calc. 141

Municipal Election—*List of voters—Calcutta Municipal Act (Beng. III of 1899), Sch. IV, rules 8 and 9—Claims, applications and objections of voters, notice of—Extension of time by Chairman, power of, for giving such notice—Specific Relief Act (I of 1877), s. 45, sub-s. (c)—Mandamus.* Under rules 8 and 9 of Schedule IV of the Calcutta Municipal Act, 1899, written notice of all claims, objections and applications referred to therein must be given to the Chairman on or before the 1st January immediately preceding each general election, and the Chairman has no power to extend the time beyond such date. Such notices must be lodged with the Chairman or the Election Department, and a lodging of such notices with the Secretary is not a proper lodging

PAGE.

Municipal Election—*contd.*

as required by the terms of the Act, even though the Secretary resides in the same building as the Corporation has its office, unless it can be shown that the Chairman had authorized the private residence of the Secretary to be used as a place where such notices could be lodged. The omission of a statutory officer to perform his public duties as to settlement of the election roll in the manner provided by the Act is a forbearance to do something that is not consonant to right and justice within the meaning of section 45 of the Specific Relief Act, 1877; and, therefore, if the Chairman has not performed his statutory duties, the Court will issue an order in the form of a *mandamus*. *In the matter of* R. C. SEN (1912), I. L. R. 39 Calc. 598

———————*Representation of associations for voting power—Calcutta Municipal Act (Beng. III of 1899), ss. 37, 38, and Schedule IV, rr. 9 and 10—"Any one individual person," meaning of—Specific Relief Act (I of 1877), s. 45—Practice—Appeal, right of.* In rule 9 of Schedule IV of the Calcutta Municipal Act of 1899, the expression "any one individual person" is controlled by the expression "association of individuals" immediately preceding, and the selection for the representation of the several associations indicated in the rule is limited to the individuals composing the associations. A rule was obtained by a candidate for election as Commissioner of a certain ward calling upon the Chairman of the Corporation of Calcutta to show cause why he should not prepare and publish the revised list of voters for the ward under rule 10 of Schedule IV of the Calcutta Municipal Act, by rejecting applications filed by a second candidate to have his name entered in the list as the representative of certain associations, and a copy of the rule was served on the second candidate, who together with the Chairman

PAGE.

Municipal Election—*concld.*

appeared and shewed cause. The rule was made absolute. *Quære:* Whether the second candidate had any right of appeal from the order. NISITH C. SEN, *In re* (1912), I. L. R. 39 Calc. ... 754

Munsif: *See* SANCTION FOR PROSECUTION 774

Mutual Consent: *See* BURMESE LAW—MARRIAGE 492

Mutuality, want of: *See* SPECIFIC PERFORMANCE 232

Non-feudatory Zamindars of Central Provinces: *See* ACT OF STATE ... 615

Notice: *See* MUNICIPAL ELECTION ... 598

———: *See* UNDER-RAIYAT 278

———, **necessity of:** *See* FURTHER INQUIRY 238

Nuisance: *See* EASEMENT 59

Obscene Publication—*Religious poem of spiritual and allegorical character based on an incident narrated in a sacred book of great antiquity and dealing with the acts of divine beings—Work not calculated to deprave or corrupt morals—Penal Code (Act XLV of 1860), s. 292—Finding of facts.* The test of obscenity is whether the tendency of the matter charged as obscene is to deprave and corrupt those whose minds are open to such immoral influences and into whose hands such a publication might fall. If in fact the work is one which would certainly suggest to the minds of the young of either sex, or even to persons of more advanced years, thoughts of a most impure and libidinous character, its publication is an offence, though the accused has in view an ulterior object which is innocent or even laudable. *Reg.* v. *Hicklin*, L. R. 3 Q. B. 360, *Steele* v. *Brannan*, L. R. 7 C. P. 261, *Queen-Empress* v. *Parashram Yeshvant*, I. L. R. 20 Bom. 193, *Emperor* v. *Hari Singh*, I. L. R. 28 All. 100, *Empress* v. *Indarman*, I. L. R. 3 All. 837, followed. A religious or classical work does not become obscene, within s. 292 of the Penal Code,

PAGE.

Obscene Publication—*contd.*

simply on account of its containing some objectionable passages, because the tendency of such publications is not to deprave or corrupt morals. If objectionable passages in a religious book are extracted and printed separately, and they deal with matters which are to be judged by the standard of human conduct, as where they relate to immoral acts of human beings, and the tendency of such publication is to deprave and corrupt those whose minds are open to immoral influences, the publication may not be justified, though the passages form part of a religious book. Where, however, a story which appears objectionable is taken from a religious book and printed separately, but it relates to beings whose conduct is not to be judged by the standard of human beings, it is not an obscene publication, as it would not, on account of its religious character, raise immoral thoughts in the minds of persons who believe in the divinity of beings whose acts and conduct are described in the story. Where a poem was published in the Uriya language containing a story, complete in itself so far as it goes, of the dalliances of Radha and Krishna, who were described as divine personages and their acts as supernatural, the latter being represented to be a boy of five, taken from the Uriya *Haribans*, a very sacred book of the Uriyas, the incident and sentiments being the same as, and the language not more objectionable than, that of the original, and it was in itself an old religious book of a spiritual and allegorical character, which had often been published and registered without exception taken, and which was apparently intended for Hindus who form the vast majority of the Uriyas and believe in the divinity of Radha and Krishna, and do not consider their doings as immoral: *Held*, that the publication was not obscene within the meaning of s. 292 of the Penal

PAGE.

Obscene Publication—*concld.*

Code. KHERODE CHANDRA ROY CHOWDHURY *v.* EMPEROR (1911), I. L. R. 39 Calc. 377

Occupancy Holding: *See* ESTOPPEL ... 513

Offence: *See* RIOTING 781

Offence committed on the High Seas: *See* HIGH COURT, JURISDICTION OF ... 487

Official Record: *See* TEISHKHANA PAPER ... 995

Oral Agreement: *See* LEASE 663

Ostensible Means of Subsistence: *See* SECURITY FOR GOOD BEHAVIOUR ... 456

Owner, liability of: *See* RIOTING ... 834

Part-heard Case: *See* TRANSFER ... 146

Parties: *See* LANDLORD AND TENANT ... 696

———: *See* MORTGAGE 527

Parties: *See* SECOND APPEAL ... 687

Execution sale—Reversal of sale—Execution purchaser—Transferee from the execution purchaser—Civil Procedure Code (Act XIV of 1882) s. 311. A transferee from the execution purchaser is a necessary party to a proceeding for reversal of the execution sale, when such proceeding is commenced after the transfer has been effected. *Bibi Sharifan* v. *Mahomed Hubibuddin*, 13 C. L. J. 535, and *In re Hammersmith Rent-charge*, 4 Exch. 87, referred to. MENAJUDDI BISWAS *v.* TOAM MANDAL (1911), I. L. R. 39 Calc. 881

Partition: *See* CUSTOM 418

Patta: *See* UNDER-RAIYAT 278

Penal Code (Act XLV of 1860), ss. 99, 147, 323: *See* RIOTING 896

———————————, **s. 124 *A***: *See* SEDITION 522, 606

———————————**ss. 147, 332**: *See* MAGISTRATE, JURISDICTION OF ... 377

———————————, **s. 154**: *See* RIOTING... 834

———————————, **s. 193**: *See* THUMB-IMPRESSION 348

PAGE.

Penal Code (Act XLV of 1860)—*concld.*

——————————, **s. 292:** *See* OBSCENE PUBLICATION ... 377

——————————, **s. 34A:** *See* CAUSING DEATH BY RASH OR NEGLIGENT ACT 855

——————————, **s. 399:** *See* MAGISTRATE 119

——————————, **ss. 494, 109:** *See* MAHOMEDAN LAW—BIGAMY 409

Police Act (V of 1861): *See* ACT OF STATE 615

Poligamy: *See* BURMESE LAW—MARRIAGE 492

Practice: *See* CHARGE, CANCELLATION OF 885

————: *See* CRIMINAL PROCEDURE CODE (ACT V OF 1898), s. 263 ... 931

————: *See* LAND ACQUISITION ... 33

————: *See* LOCAL INSPECTION ... 476

————: *See* MUNICIPAL ELECTION ... 754

————: *See* PROBATE 245

Pre-emption: *See* MAHOMEDAN LAW—PRE-EMPTION 915

Prejudice: *See* LOCAL INSPECTION ... 476

Presiding Officer, absence of: *See* SALE IN EXECUTION OF DECREE ... 26

Previous Enjoyment: *See* LIGHT AND AIR 59

Primogeniture: *See* KUNJPURA, STATE OF 711

Principal and Agent—*Contract—Undisclosed principal—Contract Act (IX of 1872), ss. 230 (2), 236.* To enable an agent to sue on a contract under section 230 (2) of the Contract Act, there must in fact have been a principal, though undisclosed, for whom he was acting in entering into the contract. Where a person in entering into a contract purported to act as agent for an undisclosed principal, but in fact no such principal existed, and the person was in reality acting on his own account, he is debarred from suing on the contract by section 236 of the Contract Act. RAMJI DAS *v.* JANKI DAS (1912), I. L. R. 39 Calc. 802

Prior Mortgage, extinguishment of: *See* MORTGAGE 527

PAGE.

Privity of Contract and Estate: *See* JURISDICTION 739

Privy Council—*Application for leave to appeal—Limitation—Admissibility of appeal filed after six months of the judgment—Time for taking copy of judgment and decree.—Limitation Act (IX of 1908), s. 12, Sch. I, Art. 179.* Clause (2) of section 12 of the Limitation Act, 1908, applies to an application for a certificate under Order XLV of the Code of Civil Procedure. EASTERN MORTGAGE AND AGENCY CO., LD., *v.* PURNA CHANDRA SARBAGNA (1012), I. L. R. 39 Calc. ... 510

Probate—*Will—Standard of proof—Testamentary capacity—Evidence as to execution—Presumption—Ex parte evidence, relevancy and weight of—Practice—Succession Act (X of 1865), ss. 46, 48, 50—Evidence Act (I of 1872), ss. 3, 10, 45, 101, 135.* The standard of proof to establish a will required by the Indian Statutes is that of the prudent man and not an absolute or conclusive one. The doctrine in *Tyrrell* v. *Painton*, [1894] P. 151, and *Barry* v. *Butlin*, 2 Moo. P. C. 480, discussed. *Shama Churn Kundu* v. *Khettromoni Dasi*, I. L. R., 27 Calc. 521; L.R. 27 I.A. 10, referred to. The presumption against misconduct exists in a civil case, though it may be rebutted by a lower standard of proof than that in a criminal trial. *Cooper* v. *Slade*, 6 H. L. Cas. 746, and *Devine* v. *Wilson*, 10 Moo. P. C. 502, referred to. The admissibility, relevancy and weight of the evidence of experts, discussed. *Per* WOODROFFE J. If the cross-examining counsel, after putting a paper into the hands of a witness, merely asks him some question as to its general nature or identity, his adversary will have no right to see the document, but if the paper be used for the purpose of refreshing the memory of the witness, or if any question be put respecting its contents or as to the handwriting in which it is written, a sight of it may then be demanded by the oppo-

PAGE.

Probate—*concld.*
site counsel. *Peck* v. *Peck*, 21 L. T. R., 670, referred to. JARAT KUMARI DASSI *v.* BISSESSUR DUTT (1911), I. L. R. 39 Calc. ... 245

Probate and Administration Act (V of 1881), ss. 78, 79, 86 : *See* ADMINISTRATION BOND 563

Procedure : *See* OFFENCE COMMITTED ON THE HIGH SEAS 487

Proclamation of Sale : *See* SALE IN EXECUTION OF DECREE 26

Prohibitory Order—*Jurisdiction—Execution of decree—Civil Procedure Code (Act V of 1908) O. XXI, r. 46—Competency of Court to issue prohibitory order outside its jurisdiction restraining a person from paying a debt due to the judgment-debtor.* It is not competent to a Court, in execution of a decree for money to attach, at the instance of the decree-holder, a debt payable to the judgment-debtor outside the jurisdiction, by a person not resident within the jurisdiction of that Court. BEGG, DUNLOP & Co. *v.* JAGANNATH MARWARI (1911), 1. L. R. 39 Calc. ... 104

Proof, standard of : *See* PROBATE ... 245

Prosecution Witnesses, cross-examination of : *See* CHARGE, CANCELLATION OF 885

'Protected Interest" : *See* LANDLORD AND TENANT 138

Protection of Judicial Officers : *See* TRESPASS 953

Publication, proof of : *See* SEDITION ... 522, 606

Punjab Ruling Chiefs : *See* KUNJPURA, STATE OF 711

Purchase free of incumbrances : *See* SALE FOR ARREARS OF REVENUE ... 377

Purchaser of Occupancy Holding : *See* ESTOPPEL 513

Purchaser pendente lite : *See* MESNE PROFITS 220

Purdanashin Donor : *See* GIFT ... 933

Railway Administration, liability of : *See* "SHAWLS," MEANING OF 1029

PAGE.

Railway Company : *See* CARRIERS ... 311

Railways Act (IX of 1890), s. 75, Sch. II(*m*) : *See* "SHAWLS," MEANING OF ...1029

Ratification of Order : *See* HABEAS CORPUS 164

Receiver : *See* GHATWALI TENURE ...1010

Recognition as Wife, effect of : *See* BURMESE LAW—MARRIAGE 492

Reconstruction : *See* BUILDING ... 84

Reconversion : *See* MAHOMEDAN LAW—BIGAMY 409

Recorded Tenant : *See* LANDLORD AND TENANT 903

Redemption, right to : *See* MORTGAGE ... 828

"Re-erection" : *See* BUILDING ... 84

Registration—*Document—Variation of terms—Registration Act (XVI of 1808), s. 17 (d).* A document which varies the amount of rent to be paid under an existing lease registered as required by s. 17(*d*) of the Indian Registration Act, as also the incidents of such payments, namely, the date of payment and consequences of default of payment, requires registration. *Durga Prasad Singh* v. *Rajendra Narain Bagchi*, I. L. R. 37 Calc. 293, approved, so far as it determines that a document embodying an agreement for reduction of rent under a previously existing lease registered, as required by s. 17(*d*) of the Registration Act, requires registration. LALIT MOHAN GHOSH *v.* GOPALI CHUCK COAL COMPANY, LD. (1911), I. L. R. 39 Calc. 284

Registration Act (III of 1877), s. 3 : *See* KABULIYAT 1016

——— (XVI of 1908), s. (2) : *See* KABULIYAT 1016

———, s. 17(*d*) : *See* REGISTRATION 284

Religious Endowment—*Religious Endowments Act (XX of 1863), ss. 7, 8 and 10—Suit brought by surviving member of a committee, whether maintainable.* A suit brought by a surviving member or members of a committee appointed under s. 7 of the Religious

PAGE.

Religious Endowment—*concld.*
Endowments Act (XX of 1863) is maintainable. *Santhalva* v. *Manjanna Shetty*, I. L. R. 34 Mad. 1, dissented from. RAGHUNANDAN RAMANUJA DAS *v.* BIBHUTI BHUSHAN MUKERJEE (1911), I. L. R. 39 Calc. 304

Religious Endowments Act (XX of 1863), ss. 7, 8, 10: *See* RELIGIOUS ENDOWMENT 304

——— **Poem:** *See* OBSCENE PUBLICATION 377

Rent-free Grant: *See* Estoppel ... 439

——— **Tank:** *See* ESTOPPEL ... 439

——— ———: *See* LIMITATION ... 453

Rents, arrears of: *See* MORTGAGE ... 810

Repute: *See* BURMESE LAW—MARRIAGE ... 492

Re-sale: *See* CONTRACT 568

Res judicata: *See* MORTGAGE ... 527

———: *See* MORTGAGE ... 925

———: *See* SHEBAIT 887

——— *Execution proceeding—Decision in such proceeding not appealed against—Finality of such decision—Erroneous decision on a question of law, whether res judicata.* A decision in a previous execution proceeding which merely lays down what the law is, and is found to be erroneous, cannot have the force of *res judicata* in a subsequent proceeding for a different relief. BAIJ NATH GOENKA *v.* PADMANAND SINGH (1912), I. L. R. 39 Calc. 848

Restoration of Immoveable Property: *See* CRIMINAL PROCEDURE CODE, 1898, s. 522 1050

Resumption: *See* JAGIRS 1

Revenue Sale Law (XI of 1859), ss. 10, 11, 53: *See* SALE FOR ARREARS OF REVENUE 353

Reversal of Sale: *See* PARTIES ... 881

Review—*Application for leave to appeal to Privy Council—Order rejecting such application, if subject of review—Interest subsequent to decree, how far can be allowed by the High Court to be calculated—Order rejecting application for review by a Court other than High Court, if appealable—Civil Procedure Code (Act V of 1908), s. 114, OO. XLVII and XLIII, r. 1 (v).* An order rejecting an application for leave to appeal to His Majesty in Council comes within the description of orders contemplated in s. 114 of the Code of Civil Procedure, 1908, and is subject to review. *Lutf Ali Khan* v. *Asgur Reza*, I. L. R. 17 Calc. 455, distinguished. The High Court should not grant leave to appeal to His Majesty in Council in cases in which the specified amount of Rs. 10,000 can only be reached by the addition of interest subsequent to the decree. *Gooroopersad Khoond* v. *Juggutchunder*, 8 Moo. I. A. 166, followed. NAND KISHORE SINGH *v.* RAM GULAM SAHU (1912), I. L. R. 39 Calc. 1037

Revision: *See* ADMINISTRATION BOND ... 563

Revisional jurisdiction: *See* HIGH COURT, JURISDICTION OF 473

Revocation, power of: *See* GIFT ... 933

Right of Private Defence: *See* RIOTING ... 896

Right to Fishery: *See* FISHERY ... 53

——— **Worship:** *See* USUFRUCTUARY MORTGAGE 227

Rioting—*Charge—Offence—Common object—Necessity of stating the common object in the charge under ss. 143, 147 and 149 of the Penal Code—Effect of omission to state the common object—"Succeeded by another Magistrate," meaning of—Criminal Procedure Code (Act V of 1898), ss. 221, 223, 350.* An offence can be legally described by its specific name in the charge, and the question whether any further particulars are necessary under s. 223 of the Criminal Procedure Code is a question of discretion according to the circumstances of each case. In cases of rioting the common object should be stated in the charge, but omission to state it, under ss. 143 and 147 of the Indian Penal Code, does not vitiate a conviction if there is evidence on the record to show it. It is otherwise with a charge under s. 149, Indian

PAGE.

Rioting—*contd.*

Penal Code, for, then, there is no specific name for the offence, and the fact that any offence is committed in prosecution of the common object is of the essence of the case, and there could be no conviction for any offence committed with a different object. It is obligatory to set out the common object in a charge under s. 149, unless it has already been specified in the main charge under s. 147. *Basiruddi* v. *Queen-Empress*, I. L. R. 21 Calc. 827, referred to. The words "succeeded by another Magistrate" in s. 350 of the Criminal Procedure Code should not be construed in a narrow sense, but should be interpreted to mean—ceases to exercise jurisdiction in the particular inquiry or trial, and not in the particular post. *Thakur Das Manjhi* v. *Namdar Mundul*, 24 W. R. Cr. 12, *Emperor* v. *Purshottam Kara*, I. L. R. 26 Bom. 418, referred to. *Mohesh Chandra Saha* v. *Emperor*, 12 C. W. N. 416, and *Ali Mahomed Khan* v. *Tarak Chandra Banerji*, 13 C. W. N. 420, followed. *Queen-Empress* v. *Radhe*, I. L. R. 12 All. 66, *Deputy Legal Remembrancer* v. *Upendra Kumar Ghose*, 12 C. W. N. 140, not followed. KUDRUTULLA *v.* EMPEROR (1912), I. L. R. 39 Calc. 781

———*Common object not unlawful—Entering upon land held jointly by the judgment-debtors to take symbolical possession thereof—Right of private defence—Liability of a person for individual acts done in excess of such right—Power of Appellate Court to alter a finding of acquittal under ss.* $\frac{325}{34}$ *of the Penal Code into one of conviction under s. 323—Penal Code (Act XLV of 1860), ss. 99, 147 and 323—Criminal Procedure Code (Act V of 1898), s. 423.* Where a body of about 10 men, belonging to the decree-holder's party, went with the Civil Court officers upon a plot of land in the joint possession of the judgment-debtors to take symbolical possession thereof, and the drummer

PAGE

Rioting—*contd.*

was assaulted by one of the latter, whereupon the appellants and their party replied by an attack on their opponents, during the course of which one of the appellants' party, not before the Court, fractured the skull of the drummer's assailant by an isolated act, but the appellants continued to beat him after he had fallen helpless on the ground: *Held*, that the appellants had a right of private defence under the circumstances, that their common object was therefore not unlawful, and that the conviction under s. 147 of the Penal Code was bad, but that, having exceeded such right by beating the wounded man after he had fallen, they were guilty under s. 323. When an attack is made on persons acting in the lawful exercise of their right over property, they are entitled to the right of private defence, and the only question that arises thereafter is whether any member of the party individually exceeded the right. Persons exercising their lawful rights are not members of an unlawful assembly, nor can the assembly become unlawful by their repelling an attack made on them by persons who had no right to obstruct them, nor by exceeding the lawful use of their right of private defence. In such a case each is liable only for his individual acts done in excess of such right. When an accused charged under ss. 147 and $\frac{325}{34}$ of the Penal Code is convicted of the former and acquitted of the latter offence, the Appellate Court has power to acquit him of rioting, and convict him of hurt under s. 323. KUNJA BHUIYA *v.* EMPEROR (1912), I. L. R. 39 Calc. 896

———*Test of liability of owner, or person having or claiming an interest in land, for the acts and omissions of an agent or manager—Appointment of latter by the mother, and not by the adopted son—Legality of the conviction of the son—Penal Code (Act XLV of 1860), s. 154.* The criminal liability of a person specified in s. 154

PAGE.

Rioting—*concld.*

of the Penal Code for the acts or omissions of an agent or manager depends upon the question by whom the latter was appointed Where, therefore, it was shown that three Hindu *pardanashin* ladies had the management of the estate and were responsible for the appointment of the *naib* who had fomented the riot, and that their adopted sons had nothing to do with such appointment, though they took some share in the active management of the estate: *Held*, that the ladies were alone liable under s. 154. It is impossible to punish in every case every person who has any interest in the land. The responsibility depends on the fact of the person who caused the riot being himself the person who has an interest in the land, or an agent or a manager of such person, and one of the facts to be proved is, whose agent or manager the person fomenting the riot is. SIVA SUNDARI CHOWDHRANI *v.* EMPEROR (1912), I. L. R. 39 Calc. ... 834

Road-cess Returns: *See* TEISHKHANA PAPER 995

———————*—Evidence—Road-cess return field by a temporary lessee—Bengal Cess Act (IX of 1880), s. 95—Evidence Act (I of 1872), s. 21.* The provisions of section 95 of the Bengal Cess Act are not exhaustive. They merely limit the application of section 21 of the Indian Evidence Act, and exclude road-cess returns when they are sought to be admitted in favour of the person by or on behalf of whom they have been filed. A road-cess return filed by a person in his capacity as a temporary lessee of a certain property is admissible in evidence in favour of the superior landlord, inasmuch as he could not be regarded as a person by or on behalf of whom the return was filed. SEWDEO NARAIN SINGH *v.* AJODHYA PROSAD SINGH (1912), I. L. R. 39 Calc. 1005

Royalties, arrears of: *See* MORTGAGE ... 810

PAGE.

Sale by Servant or Partner: *See* ADULTERATION 682

Sale, confirmation of: *See* SECOND APPEAL 687

Sale for Arrears of Revenue—*Act XI of 1859, ss. 2 and 3—Bengal Ac VII of 1868—Government tenures in mahal Panchannagram in the 24-Parganahs—Kabuliyat fixing date for payment of revenue in every year—Sale for arrears when no arrears were due—Variation of contract of parties by general considerations or administrative rules, not permissible.* Section 2 of Act XI of 1859 enacts that "if the whole or a portion of a *kist* or instalment of any month of the era according to which the settlement and *kitsbandi* of any mahal have been regulated be unpaid on the 1st of the following month of each era, the sum so remaining unpaid shall be considered as an arrear of revenue." Section 3 provides that the "Board of Revenue at Calcutta shall determine upon what dates all arrears of revenue shall be paid up in each district under their jurisdiction, in default of which payment estates in arrear shall be sold;" and a notification duly published in compliance with that section on 6th October 1871 "fixed the 28th June of each respective year as the latest date of payment of the rents of all descriptions of tenures in khas mahal Panchannagram, in default of which payment on or previous to that date tenures in arrears in that mahal will be sold." The appellant was the holder of a Government tenure in Dihi Panchannagram, to which, by virtue of Bengal Act VII of 1868, Act XI of 1859 was applicable; and the kabuliat under which he held stipulated for "payment of the whole *jumma* in the Collectorate within 28th June every year." The revenue remaining unpaid on 28th June 1902, the tenure was, after the preliminary procedure prescribed by the Acts, sold for arrears of revenue on 16th March 1903, and purchased by the respondent: *Held* (reversing the decision of the High Court), that, on the con-

PAGE.

Sale for Arrears of Revenue —*contd.*
struction of the Acts and the above notification, the revenue was not in arrear until 1st July 1902, and the date fixed as that on which the tenure could be sold in default of payment of the arrears 28th June 1903. There were, therefore, at the date of the sale no arrears of revenue, and in accordance with the decision in *Balkishen Das* v. *Simpson*, I. L. R. 25 Calc. 833, L. R. 25 I. A. 151, the sale was consequently invalid. No variation of the contract of parties and the statutory provisions applicable thereto is possible by reason of general consideration of administrative rules which have not the sanction of Indian statue. HAJI BUKSH ELAHI *v.* DURLAV CHANDRA KAR (1912), I. L R 39 Calc. 981

——————————*Revenue Sale Law (Act XI of 1859), ss. 10, 11 and 53—Estate held in common tenancy, meaning of—Purchase at a revenue sale of an undivided interest of specific mouzas in an estate, in respect of which separate accounts were opened, effect of—Reference to a third Judge—Civil Procedure Code (Act XIV of 1882), s. 575—(Act V of 1890), s. 98(2).* *Per* MOOKERJEE and VINCENT JJ. (BRETT J. dissenting), that a proprietor who is not a recorded sharer of a joint estate held in joint tenancy, within the meaning of s. 10 of the Revenue Sale Law, nor a recorded sharer whose share consists of a speeific portion of the lands of the estate within the meaning of s. 11, but is recorded as proprietor of an undivided interest held in common tenancy of a specific portion of the lands of the estate, but not extending over the whole estate within the meaning of s. 70 of the Land Registration Act, is not entitled to acquire the estate purchased by him at a sale, held for arrears of revenue, free of encumbrances. The expression "estate held in common-tenancy" in s. 10 of the Revenue Sale Law means an estate where all the sharers have a common right and

PAGE.

Sale for Arrears of Revenue—*concld.*
interest in the whole of the estate. Where, therefore, various co-sharers have certain interest, not in the whole estate, but only in particular villages of that estate, it cannot be said that the estate is held in common-tenancy *Nanhoo Shahee v. Ram Pershad Narain Singh*, 21 W. R. 38, followed. MAHAMMAD MEHDI HASSAN KHAN v. SHEOSHANKAR PERSAD SINGH (1911), I. L. R. 39 Calc. 353

Sale for Arrears when no Arrears due : *See* SALE FOR ARREARS OF REVENUE ... 981

Sale in Execution of Decree : *See* PARTIES... 881

—————————*Setting aside sale—Material Irregularity, allegation of—Civil Procedure Code (Act XIV of 1882), ss. 287, 291—Proclamation of sale—Sale fixed to take place "at monthly sales," naming day, place and hour of commencement of such sales—Absence of presiding officer.* A sale in execution of a decree was adjourned from 16th May until 13th July, and in the fresh proclamation of sale issued it was notified that "in the absence of any order of postponement the sale would be held at monthly sales commencing at 6 o'clock on the morning of 13th July 1903 at Monghyr." Owing to the absence of the presiding officer from the station, the monthly sales did not begin until 17th July, and in the course of them the sale in question was held on the 20th. On an application under section 311 of the Civil Procedure Code (Act XIV of 1882) to set aside the sale on the ground of "material irregularity" within the meaning of sections 287 and 291 of the Code : *Held* (affirming the decision of the Courts in India), that in holding the sale on 20th July the Court had not acted in contravention of the provisions of the Code, and there had been no "material irregularity" in publishing or conducting the sale. RANG LAL SINGH *v.* RAVANESHWAR PERSHAD SINGH (1911), I. L. R. 39 Calc. 26

Sale of Goods : *See* CONTRACT ... 568

PAGE.

Sale of Goods, contract for : *See* STAMP-DUTY 669

Sale of Mortgaged Property : *See* MORTGAGE 527

Sanction for Prosecution : *See* USING AS GENUINE A FORGED DOCUMENT ... 463

——————— *Sanction refused by Munsif—Appeal—Sanction granted by Subordinate Judge—Jurisdiction—Criminal Procedure Code (Act V of 1898), s. 195—Civil Courts Act (XII of 1887), ss. 21 and 22—Civil Procedure Code (Act V of 1908), ss. 24 (1) (a) and 115.* A suit having been dismissed by the Munsif, and no appeal, by the Court of Appeal, the defendants applied to the Munsif for sanction to prosecute the plaintiffs for offences under ss. 468 and 471 of the Indian Penal Code. This application was refused, but, on appeal, the Subordinate Judge granted such sanction : *Held*, that the Court of the District Judge was the only Court to which such an appeal would properly lie. *Per* N. R. CHATTERJEA J. For the purposes of s. 195 of the Criminal Procedure Code, a Munsif is not subordinate to a Subordinate Judge. RAM CHARAN CHANDA TALUKDAR *v.* TARIPULLA (1912), I. L. R. 39 Calc. ... 774

Search for Arms : *See* TRESPASS ... 953

Search for Explosives : *See* MAGISTRATE ... 119

Search Warrant : *See* MAGISTRATE, JURISDICTION OF 377

Second Appeal—*Chota Nagpur Tenancy Act (Beng. VI of 1908), ss. 87, 224, 264—Civil Procedure Code (Act V of 1908), s. 100—Landlord and tenant.* No second appeal lies to the High Court from the decision of a Judicial Commissioner passed on appeal against the decision of a Revenue officer, under section 87 of the Chota Nagpur Tenancy Act. RAGHUBAR SAHI *v.* PROTAP UDOY NATH SAHI DEO (1911), I. L. R. 39 Calc. 241

——————— *Sale, application for confirmation of, by auction-purchaser against judgment debtor, under s. 312 of the Code—Auction-parchaser, if a*

PAGE.

Second Appeal—*concld.*

necessary party in a proceeding under s. 311 of the Code—Civil Procedure Code (XIV of 1882), ss. 311, 312. No second appeal lies against an order refusing an application by the auction-purchaser against the judgment-debtor, for confirmation of sale, under s. 312 of the Code of Civil Procedure, 1882, inasmuch as such a case between the auction-purchaser and the judgment-debtor cannot be regarded as a proceeding between the parties to the suit or their representatives under s. 244 of the Code. The auction-purchaser is not a necessary party to an application under s. 311 of the Code. *Karamat Khan* v. *Mir Ali Ahmed*, All. W. N. (1891), 121, not followed. *Ali Gauhar Khan* v. *Bansidhar*, I. L. R. 15 All. 407, distinguished. SURENDRA MOHINI DEBI *v.* AMARESH CHANDRA CHATTERJEE (1912), I. L. R. 39 Calc. 687

Second Marriage : *See* MAHOMEDAN LAW—BIGAMY 409

Security for good behaviour—*Return of absconding suspect home on withdrawal of warrant, and residence in his father's house without taking steps to conceal himself to commit an offence—Relevancy of evidence of previous connection with a criminal conspiracy or concealment outside the trying Magistrate's jurisdiction—Ostensible means of subsistence—Support by father possessing substance—Jurisdiction of Magistrate to require a person to give an account of his presence while in another jurisdiction—Criminal Procedure Code (Act V of 1898), s. 109, cls. (a), (b).* Clause (*a*) of section 109 of the Criminal Procedure Code should be read in its entirety. The concealment referred to therein must be with a view to committing some offence. Where a person, against whom a warrant had been issued, absconded from home for two years, but returned thereto after its withdrawal, and was found living in his father's house, without having taken any particular steps to conceal himself

PAGE.

Security for good behaviour—*concld.*

for the purpose of committing any offence thereafter, the fact of previous connection with a criminal conspiracy or of present correspondence with criminals outside the Magistrate's jurisdiction, is not relevant under section 109, though it might form basis or a substantive proceeding under section 110. A person cannot be called on to furnish security under section 109 in respect of an alleged temporary concealment in his father's house unconnected with any intent to commit an offence, nor with any previous concealment outside the Magistrate's jurisdiction. As long as a young man, out of employment, is staying in the house of his father, who is a man of substance and able, if necessary, to support him, he cannot be held to be without ostensible means of subsistence. Where the account a person gives of his presence within the limits of a Magistrate's jurisdiction is satisfactory, *e.g.*, that he has returned to, and is living in, his father's house in strict seclusion on the withdrawal of a warrant against him, he cannot be called upon by such Magistrate to give an account of his presence in any other jurisdiction. SATISH CHANDRA SARKAR *v.* EMPEROR (1912), I. L. R. 39 Calc. ... 456

Security for production of insolvent debtor: *See* FORFEITURE 1048

Sedition—*Publication—Handwriting, proof of—Admissibility and value of expert opinion not based on comparison made in Court with admitted or proved handwriting of the person alleged—Penal Code (Act XLV of 1860), s. 124A—Evidence Act (I of 1872), s. 45.* On a charge under s. 124A of the Penal Code the sending of a pamphlet by post, addressed to a private individual, not by name, but by designation, as the representative of a large body of students, amounts to publication. It is necessary for the admission of the evidence of a handwriting expert, under s. 45 of the Evidence Act, that the writing with

PAGE.

Sedition—*concld.*

which the comparison is made should be admitted or proved beyond doubt to be that of the person alleged, and that the comparison should be made in open Court in the presence of such person. *Cresswell* v. *Jackson*, 2 F. & F. 24, *Cobbet* v. *Kilminster* 4 F. & F. 490, and *Phoodee Bibee* v. *Gobind Chander Roy*, 22 W. R. 272, referred to. SURESH CHANDRA SANYAL *v.* EMPEROR (1912), I. L. R. 39 Calc. ... 606

———*Publication, proof of—Necessity of proving, posting or printing and publishing under the directions of the accused, when it is shown that the handwriting is his, and that the seditious matter was actually printed and published—Seditious manuscript transmitted by post but intercepted before it reached addressee—Attempt to commit sedition—Penal Code (Act XLV of 1860), s 124A.* It is not necessary, in order to establish the fact of publication of seditious matter transmitted through the post-office, on a charge under s. 124A of the Penal Code, to prove the actual posting, nor that it was printed and published under the directions of the accused. If the seditious writing is shown to be in the handwriting of the accused, and it is further proved that the contents were in fact printed and published, there is sufficient evidence of publication by him : *Regina* v. *Lovett*, 9 C. & P. 462, followed. The sending through the post of a packet containing a manuscript copy of a seditious publication with a covering letter requesting the addressee to circulate it among others, when the same was intercepted by another person and never reached the addressee, constitutes an attempt within the purview of s. 124A of the Penal Code. SURENDRA NARAYAN ADHICARY *v.* EMPEROR (1911), I. L. R. 39 Calc. 522

Sentence : *See* OFFENCE COMMITTED ON THE HIGH SEAS 487

Setting aside Sale : *See* SALE IN EXECUTION OF DECREE 26

PAGE.

Settlement, construction of—*Settlement of malikana or dasturat payable to zamindar in 1780—Allowance as compensation for portions of land taken by Government for the creation of jagirs—Liability of jagirdars—Resumption by Government, effect of—Suit for sum referred to as malikana in settlement and account of 1865—Long acquiescence in sum settled in 1780.* This was a suit in which the appellant, the Maharaja of Darbhanga, claimed to be paid an annual sum of Rs. 482 odd by the Government of India as dasturat or malikana, an allowance by way of compensation to the proprietors for the loss of their proprietary rights in portion of their land taken by the Government for the creation of jagirs (or revenue-free holdings) and which until resumption by Government was payable by the jagirdars, but for the payment of which on resuming them the Government themselves became liable. The claim was based upon an order of 10th May 1865, by which the appellant alleged that the annual malikana payable to him in respect of land called mauzah Sahu was permanently fixed at Rs. 482-0-3. The defence was that the malikana payable in respect of a jagir known as Meherullah Khan, of which mauzah Sahu formed part, was settled in 1780 at Rs. 796-2-9, and nothing further was recoverable ; and that the order made in 1865 did not give the right claimed. The sum of Rs. 796-2-9 had admittedly been paid to the predecessors in title of the appellant since 1780, and was still being paid to the appellant himself, but he claimed to be paid the sum of Rs. 482 odd in addition. His contention was that the fixing of the malikana in 1780 was not a final ascertainment of the rights of his predecessors in title in respect of it, but was merely a temporary fixing of the percentage by which the amount should be ascertained from time to time, as it varied together with the variation of the amount of the proceeds of the land.

PAGE.

Settlement, construction of—*concld.*

Both Courts in India held that the appellant was entitled to nothing more than the Rs. 796-2-9 already paid to him : *Held* (affirming those decisions), that what was done in 1780 amounted to a final settlement of the owner's rights in respect of the malikana, the payment of which was to be made regularly every year from 1780, no term being fixed. That it was regarded as final by the parties concerned was clear from the fact that the payment was made thenceforward for a century without any suggestion that it was in any way wrong, or was subject to revision. The settlement of 1865 only dealt with the method of payment of the malikana. It provided neither for any alteration nor for any addition to the malikana already fixed in 1780. The account attached to the settlement was made for the purposes of the settlement only, and the reference in it to malikana was made merely because the malikana was an item to be taken into account in fixing the annual *jama* to be paid by the person in whose favour the settlement was made in respect of the mauzahs comprised in the settlement. That this was the right view to take of the settlement of 1865, and the account annexed to it, was confirmed by the fact that no claim was ever made by the appellant for payment of the malikana until 1892, 27 years after the date of the permanent settlement, and that no such payment had ever been made to him. RAMESHWAR SINGH *v.* SECRETARY OF STATE FOR INDIA (1911), I. L. R. 39 Calc. 1

Shawls, meaning of—*Railway administration, liability of—Loss of parcel—Railways Act (IX of 1890), s. 75, and Sch. II (m)—Value of contents of parcel if to be declared—Alwan—Damages, suit for—Costs.* The term "shawls" in Schedule II, cl. (*m*) of the Railways Act, refers to Indian shawls of special value, and cannot be taken to apply to articles of inferior

PAGE.

Shawls, meaning of—*concld.*

value such as *alwans*. SARAT CHANDRA BOSE *v.* SECRETARY OF STATE FOR INDIA (1912), I. L. R. 39 Calc. ...1029

Shebait: *See* EXECUTION OF DECREE ... 298

——: *See* LAND ACQUISITION ... 33

——: *Res judicata—Successor of a shebait, when bound by a decree passed against the shebait—Limitation Act (XV of 1877), Sch. II, Art. 124—Hereditary office of a shebait—Adverse possession of the office.* The widow of a *shebait* of a certain temple, who succeeded her deceased husband in that office, mortgaged some land, as also her interest in the temple-income, to one J, who obtained a decree on his mortgage on the 24th of September 1880. In execution thereof he put up the temple-income for sale, purchased it himself and obtained delivery of possession in 1892. The widow and the next reversioner then brought a suit to set aside the sale on the ground that the property sold was not saleable. That suit was withdrawn with liberty to bring a fresh suit. The widow alone then brought another suit, which was dismissed on the ground that it was barred by section 244 of the Code of Civil Procedure (Act XIV of 1882). She having died, the reversioner brought a suit against the said J, on the 3rd of January 1910, for a declaration that he was entitled to the temple-income inasmuch as it was not saleable. On objections taken by the defendant that the suit in so far as it related to the temple income was barred by the rule of *res judicata* and by limitation: *Held*, that, inasmuch as there was no collusion or dishonesty about the former suits, and as in one of them the plaintiff himself was a party, the decree passed in the suit against the *shebait* (widow) would bind her successor (the plaintiff), and that therefore the present suit was barred by the rule of *res judicata*. *Held*, further, that Art. 124 of Sch. II of the Limitation Act applied to the case, and that as the suit was brought more than twelve years after the date when the defendant obtained possession of the hereditary office by receipt of the temple-income, it was barred by limitation. JHARULA DAS *v.* JALANDHAR THAKUR (1912), I. L. R. 39 Calc. 887

Sheikh Ansaris, tribe of: *See* CUSTOM ... 418

Short Delivery: *See* CARRIERS ... 311

Simultaneous Adoption: *See* HINDU LAW—ADOPTION 582

Sister: *See* HINDU LAW—SUCCESSION ... 319

Sister's Son: *See* HINDU LAW—SUCCESSION 319

Small Cause Court, error by: *See* HIGH COURT, JURISDICTION OF ... 473

Solicitor, duty of: *See* GIFT ... 933

Son, liability of: *See* HINDU LAW—FATHER'S DEBT 862

——: *See* HINDU LAW—SURETY 843

Sovereign Rights: *See* ACT OF STATE ... 615

Specific Performance: *See* LEASE ... 663

——*Right to minor of specific performance of contract entered into on his behalf by his guardian and manager of his estate—Contract for purchase of immovable property, and sale of it to minor—Power of guardian and manager—Want of mutuality.* In a suit for specific performance by a minor of an agreement for the purchase and sale to him of certain immovable property, entered into by the manager of the minor's estate and his guardian on his behalf: *Held*, by the Judicial Committee, that it was not within the competence, either of the manager of the minor's estate or of the guardian of the minor, to bind the minor or the minor's estate by a contract for the purchase of immovable property; that as the minor was not bound by the contract, there was no mutuality; and that consequently the minor could not obtain specific performance of the contract. MIR SARWARJAN *v.* FAKHRUDDIN MAHOMED CHOWDHURI (1911), I. L. R. 39 Calc. 322

PAGE.

Specific Relief Act (I of 1877), s. 2: *See* COURT-FEE 704

——————, **s. 45:** *See* MUNICIPAL ELECTION ... 754

——————, **s. 45: sub-s. (c):** *See* MUNICIPAL ELECTION 598

Spirituous and fermented liquors: *See* EXCISABLE ARTICLES 1053

Stamp Act (II of 1899), ss. 5, 6, 36; Sch. I, Arts. 5, 43: *See* STAMP-DUTY ... 669

——————, **Sch. I, Art. 1:** *See* ACKNOWLEDGMENT 789

Stamp-duty: *See* ACKNOWLEDGMENT ... 789

——————*Bought and Sold notes—Stamp Act (II of 1899), ss. 5, 6 and 36, Sch. I, Arts. 5 and 43—Arbitration—Admission, by arbitrators, of document not duly stamped, effect of—Bengal Chamber of Commerce, arbitration by—Rules relating to—Umpire, omission to nominate, effect of—Disclosure of names of arbitrators if contemplated by the rules—Reference, provision for appearance of parties on.* A contract for or relating to the sale of goods comprised in bought and sold notes, which contain a provision to refer disputes to arbitration, is chargeable with a stamp-duty of two annas on each broker's note under Art. 43 of ths Stamp Act, and not with a duty of eight annas as an agreement. *Kyd* v. *Mahomed*, I. L. R. 15 Mad. 150, followed. If a document, which is not duly stamped, were admitted in evidence by arbitrators on a reference, the provisions of section 36 of the Stamp Act would prevent such admission being called into question at any stage of the same suit or proceeding, except as provided in section 61, and an application to file the award of the arbitrators would be a "stage of the same proceeding." The arbitration rules of the Bengal Chamber of Commerce, grammatically speaking, require an umpire to be nominated before the arbitrators enter upon the reference, but the omission to so nominate an umpire would not be a ground for setting aside or varying the award having regard to the provisions of rule VI (*o*). The arbitration rules of the Bengal Chamber of Commerce (rule X) contemplate that the names of the arbitrators shall not be disclosed to the parties. *Chooni Lall* v. *Madhoram*, I. L. R. 36 Calc. 388, 13 C. W. N. 297, and *Hurdwary Mull* v. *Ahmed Musaji Selaji*, 13 C. W. N. 63, dissented from. Rule VI (*g*) provides that the parties shall not, without the express permission of the arbitrators, be entitled to appear. The parties have no right to appear, or even to ask for such permission. THE BOMBAY COMPANY, LD., *v.* THE NATIONAL JUTE MILLS CO., LD. (1912), I. L. R. 39 Calc. 669

Statement by Accused, value of: *See* CAUSING DEATH BY RASH OR NEGLIGENT ACT 855

Stridhan: *See* HINDU LAW—SUCCESSION 319

Subdivisional Magistrate, subordination of: *See* MAGISTRATE, JURISDICTION OF ...1041

Subordinate Judge: *See* SANCTION FOR PROSECUTION 774

"Succeeded by another Magistrate": *See* RIOTING 781

Succession: *See* HINDU LAW ... 319

——————: *See* KUNJPURA, STATE OF ... 711

Succession Act (X of 1865), ss. 46, 48, 50: *See* PROBATE 245

——————, **s. 90:** *See* HINDU LAW—WILL 87

Successive Adoption: *See* HINDU LAW—ADOPTION 582

Suit for Land: *See* JURISDICTION ... 739

Surety: *See* HINDU LAW—SURETY ... 843

Surviving Member of Committee, suit by: *See* RELIGIOUS ENDOWMENT ... 304

Symbolical Possession: *See* RIOTING ... 896

Tank: *See* ESTOPPEL 439

Teishkhana Paper—*Evidence—Official record—Road-cess returns—Bengal Cess Act (IX of 1880), s. 95—Road-cess return filed by a co-sharer landlord, and assessment made on the basis*

PAGE.

Teishkhana Paper—*concld.*

of it—Whether such return is admissible in evidence against the other co-sharers. Teishkhana paper is a register kept for the information of the Collector, but it is in no sense an official record; therefore, before a *teishkana* paper could be used in evidence, it must be proved that it had been kept in due course by the registered patwari. *Baijnath Singh* v. *Sukhu Mahton*, I. L. R. 18 Calc. 534, and *Samar Dasadh* v. *Juggul Kishore Singh*, I. L. R. 23 Calc. 366, distinguished. Persons interested to the extent of a one-fourth share of the superior interest filed a road-cess return under the provisions of the Bengal Cess Act, and they stated therein, as they were bound to do under the law, the names of the tenants in occupation of specific lands. The statement which they made was against their interest. No similar return was filed by the persons who represented the remaining three-fourths share of the superior interest, and the Revenue authorities assessed the road-cess, as they were entitled to do, upon the return filed by the one-fourth shareholders: *Held*, that the return filed by the one-fourth shareholders is admissible in evidence as against the remaining shareholders of the superior interest. *Nusseerun* v. *Gouree Sunkur Singh*, 22 R. W. 192, distinguished. Section 95 of the Bengal Cess Act (IX of 1880) is not exhaustive. It was intended to restrict the operation of section 21 of the Evidence Act, and a road-cess return may be admissible in evidence as against persons other than the one who has made the return. CHALHO SINGH *v.* JHARO SINGH (1911), I. L. R. 39 Calc. 995

Testamentary Capacity: *See* PROBATE ... 245

Thumb-impression—*Evidence—Taking of thumb-impression out of Court without objection made—Admissibility of such impression in a subsequent trial for giving false evidence—Evidence Act (I of 1872), s. 132, and proviso*

PAGE.

Thumb-impression—*concld.*

—Penal Code (Act XLV of 1860), s. 193. Where a Magistrate, believing that the complainant had given false evidence in the course of a trial, by denying the fact of a previous conviction, had his thumb-impression taken out of Court, for the purpose of identification in a future prosecution under section 193 of the Penal Code, and there was nothing to show that the latter had objected to the taking of it:—*Held*, that the thumb-impression was admissible in a subsequent trial for giving false evidence, and that the proviso to section 132 of the Evidence Act was not applicable, inasmuch as (i) the taking of such an impression was not equivalent to asking a question and receiving an answer, (ii) no objection was made to the taking of it, and (iii) it was not taken in the course of a trial. *Queen* v. *Gopal Doss*, I. L. R. 3 Mad. 271, and *Moher Sheikh* v. *Queen-Empress*, I. L. R. 21 Calc. 392, referred to. TUNOO MIA *v.* EMPEROR (1911), I. L. R. 39 Calc. 348

Transfer—*Notification by Local Government, empowering a particular Judge to deal with a part-heard case pending in another Court, how far legal—Civil Procedure Code (Act V of 1908), s. 92—Powar of District Judge to transfer a case from his file, by virtue of such notification.* A notification by the Local Government, under section 92 of the Civil Procedure Code (Act V of 1908), directed to a particular Judge and purporting to deal with a particular litigation, which was already pending in the Court of the District Judge, is *ultra vires*. A District Judge, therefore, has no power to transfer a case brought under section 92 of the Civil Procedure Code, which was pending in his Court, to the Court of a particular Subordinate Judge, who was empowered by Local Government to try it, by virtue of such a notification. ABDUL KARIM ABU AHMED KHAN *v.* ABDUS SOBHAN CHOWDHRY (1911), I. L. R. 39 Calc. ... 146

PAGE.

Transferee from Execution-Purchaser: *See* PARTIES 881

Transfer of Property Act (IV of 1882), ss. 4, 105, 107: *See* KABULIYAT ...1016

Transfer of Property Act (IV of 1832), s. 59: *See* USUFRUCTUARY MORTGAGE ... 227

Transfer of Property Act (IV of 1882), s. 85: *See* MORTGAGE 527

Transfer of Property Act (IV of 1882), s. 126: *See* GIFT 933

Transfer of Property Amendment Act (III of 1885), s. 3: *See* KABULIYAT ...1016

Transmission by Post: *See* SEDITION ... 522

Transport: *See* EXCISABLE ARTICLES ...1053

Trespass—*Right of Magistrate to order search for arms—Criminal Procedure Code (Act V of 1898), ss. 36, 94, 96, 105, Schedule III (8)—Jurisdiction to issue search warrant—Arms Act (XI of 1878), s. 25—Provision as to recording grounds for belief, in s. 25, whether mandatory or directory—Protection of Judicial officers—Directing search where offence has been committed is judicial action—Charge of want of bonâ fides and malice reprobated.* For some time prior to 27th April 1907, much ill-feeling existed in and about Jamalpore, a subdivision of Mymensingh, between the Hindu and Mahomedan communities, and much excitement and resentment had been aroused on account of the action of the Hindus in attempting some days before that date to enforce a boycott of *bideshi* or foreign goods. On 27th April, at night, a Mahomedan was wounded by a revolver shot fired by one of a party of Hindus, dressed as Mahomedans, who after the occurrence took refuge in some *cutcherries* belonging to the leading zamindars of the neighbourhood who were active sympathisers with the action of the Hindus. A crowd of Mahomedans at once collected, and proceeded to the *cutcherries*, but were prevented from attacking them by the District Superintendent of Police, and the Subdivisional Officer, who, hearing of what had occurred, proceeded to the

PAGE

Trespass—*contd.*

cutcherries, and restrained the mob, thereby averting a serious riot. A large number of Hindus, some of them with arms, had collected in a temple close by, and having bolted and barred the doors refused admittance which was demanded by the District Superintendent of Police and the Subdivisional Officer. Shots were fired from inside the temple, and a man in the crowd outside was wounded. The District Magistrate was then sent for, and on his arrival on the morning of 28th April he decided, in consultation with the District Superintendent of Police and the Subdivisional Officer, that it was necessary to search the *cutcherries* to obtain possession of the arms used on the 27th, and others which it was reported to them were concealed there, and also for the purpose of, and in connexion with, the investigation of the offences committed. The *cutcherries* were found locked, and as no officer or servant of the zemindars could be found, they were broken open under the District Magistrate's orders and instructions, and a search was made therein by the District Superintendent of Police and the men acting under his orders. No arms of any kind were found. In a suit for trespass against the District Magistrate, instituted by one of the zamindars whose *cutcherry* had been searched: *Held* (reversing the decision of the first Court and of the majority of the Appellate Court, and upholding the decision of BRETT J.), that the search was warranted by the Code of Criminal Procedure (Act V of 1898). A serious offence had been committed against the public tranquillity into which it was the duty of the District Magistrate to enquire, and by virtue of his superior rank he was, at Jamalpore, the proper person to conduct the inquiry. By section 36, Schedule III, and section 96 of the Code the power of issuing a search-warrant was among his "ordinary powers," and therefore under section 105 he had powers to direct a search

PAGE.

Trespass—*concld.*

to be made in his presence if he thought it advisable to do so. That being so, it was unnecessary to decide on the other defences set up but, *semble*, (agreeing with the majority of the Court of Appeal) that the District Magistrate not having complied with the preliminary condition prescribed by section 25 of the Arms Act (XI of 1878) could not defend his action under that Statute. Also (agreeing with BRETT J.), that the District Magistrate in directing a general search of the plaintiff's *cutcherry* in view of an inquiry under the Criminal Procedure Code, was acting in the discharge of his judicial functions and, had it been necessary, might have appealed for protection to Act XVIII of 1850. The charge of personal misconduct advanced and reiterated without any shadow of proof deserved the severest reprobation. CLARKE *v.* BRAJENDRA KISHORE ROY CHOWDHURY (1912), I. L. R. 39 Calc. ... 953

Turn of Worship: *See* USUFRUCTUARY MORTGAGE 227

Under-raiyat—*Bengal Tenancy (Act VIII of 1885), s. 48—Holding of under-raiyat.* Section 48 of the Bengal Tenancy Act applies to cases in which the land held by the raiyat is co-extensive with the land held by the under-raiyat. NIM CHAND SAHA *v.* JOY CHANDRA NATH (1912), I. L. R. 39 Calc. 839

——— *Patta for a period of indefinite duration—Ejectment—Notice—Bengal Tenancy Act (VIII of 1885), s. 49, cl. (b).* The case of an under-raiyat holding under a *patta* executed before the passing of the Bengal Tenancy Act, and not expressly providing for the period of its duration, comes within cl. (*b*) of s. 49 of the Bengal Tenancy Act, and the notice must be as provided thereunder. *Madan Chandra Kapali* v. *Jaki Karikar*, 6 C. W. N. 377, overruled. RAJ KUMARI DEBI *v* BARKATULLA MANDAL (1911), I. L. R. 39 Calc. 278

PAGE.

Undisclosed Principal: *See* PRINCIPAL AND AGENT 802

Undivided Interest, purchase of: *See* SALE FOR ARREARS OF REVENUE ... 353

User: *See* USING AS GENUINE A FORGED DOCUMENT 463

Using as genuine a forged document—*Handing over of a forged rent-receipt by accused, in the course of a criminal trial, to his mukhtear—Examination by the mukhtear of a witness thereon—Receipt filed by the Magistrate with the record though not proved—Grant of sanction to landlord's agent not a party to the criminal case—Sanction by successor of Magistrate before whom the forged document was used—Penal Code (Act XLV of 1860), s. 471—Criminal Procedure Code (Act V of 1898), s. 195.* Where the accused, during the course of a criminal trial against him of rioting and theft of crops, handed over to his mukhtear a forged rent-receipt, bearing a counterfeit seal of the landlord, to prove his possession, and the latter put the same to a witness and questioned to him as to its genuineness, but, on the witness alleging that it was a forgery, the trying Magistrate took it, initialled it and placed it on the record: *Held*, that there was a user of the document within s. 471 of the Penal Code. *Ambica Prasad Singh* v. *Emperor*, I. L. R. 35 Calc. 8 0, distinguished. A sanction granted to the agent of the landlord whose seal was forged is valid, though neither was a party to the criminal case in which the forged document was used. A sanction granted by the successor of a Magistrate before whom the forged document was used is good in law. RATI JHA *v.* EMPEROR (1911), I. L. R. 39 Calc. 463

Usufructuary Mortgage—*Turn of worship in a temple—Transfer of Property Act (IV of 1882), s. 59—Mortgage-bond creating right to worship, whether requires attestation.* A turn of worship is not an interest in immovable

PAGE.

Usufructuary Mortgage—*concld.*

property. Therefore an usufructuary mortgage-bond creating an interest in a turn of worship does not require attestation by witnesses under section 59 of the Transfer of Property Act. *Eshan Chandra Roy* v. *Monmohini Dassi*, I. L. R. 4 Calc. 683, referred to. JATI KAR *v.* MUKUNDA DEB (1911), I. L. R. 39 Calc. ... 227

Valuation of Property, basis of: *See* MUNICIPAL ASSESSMENT 141

Voters, list of: *See* MUNICIPAL ELECTION 598

——————: *See* MUNICIPAL ELECTION 754

Warrant: *See* HABEAS CORPUS ... 164

Warrant with Alterations: *See* MAGISTRATE, JURISDICTION OF ... 403

Water, passage of: *See* DISPUTE CONCERNING EASEMENT 560

Widow, representative of: *See* MORTGAGE 925

Will: *See* HINDU LAW 87

PAGE.

Will—*concld.*

—— *See* PROBATE 245

Withdrawal of Rights: *See* ACT OF STATE 615

Witnesses, examination of: *See* CRIMINAL PROCEDURE CODE, 1898, s. 268 ... 931

Words and Phrases:—

"Any one individual person": *See* MUNICIPAL ELECTION 754

"Gambling" and "Wagering": *See* COTTON-GAMBLING 968

"Witnesses for the defence": *See* JURISDICTION OF MAGISTRATE ... 885

Work calculated to deprave Morals: *See* OBSCENE PUBLICATION 377

Worship, turn of: *See* USUFRUCTUARY MORTGAGE 227

Zamindary Rights: *See* KUNJPURA, STATE OF 711

(54)